122-154

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1884~~. 693 387

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1084.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Transcript from State court	1	1
Summons	1	1
Complaint	1	1
Answer	13	18
Petition for removal	14	19
Bond for removal	18	20
Order for removal	21	21
Clerk's certificate	22	22
Caption	23	22
Order docketing cause	23	22
Stipulation waiving jury	24	22
Decision	25	23
Exceptions	27	23
Judgment	29	24
Bill of exceptions	31	25
Stipulation as to facts	32	25
Facts in the Kelly case	33	27
Stipulation and affidavits in Kelly case	38	34

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Act of N. Y. Legislature, April 30, 1883	40	37
Findings	41	38
Exceptions	43	39
Opinion	47	40
Writ of error	54	44
Bond	56	44
Citation	59	45
Assignment of errors	61	46
Clerk's certificate	66	47

1

Supreme Court.

Trial desired in Albany County.

CHAUNCEY P. WILLIAMS, Plaintiff,
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 8, 1883.

HALE & BULKLEY,
Plaintiff's Attorneys.

Office address and post-office address, 25 North Pearl street, Albany, New York.

Supreme Court, County of Albany.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The complaint of the above-named plaintiff respectively shows, on information and belief—

First. That the county of Albany is a body politic and corporate, created by and under the laws of the State of New York, and that its powers can only be exercised by the defendant, and that under the laws of said State of New York said county can sue and be sued only in the name of the board of supervisors thereof, and that the said county is liable to the plaintiff in the sum of nine thousand and twenty-four dollars and sixty-six cents, with interest thereon from the 3d day of May, 1877, for money wrongfully taken from the plaintiff and his assignors, and wrongfully received and held by said county of Albany in the manner following—that is to say: The plaintiff and certain other persons, estates, and corporations named in the schedule hereinafter referred to were on the first day of September, 1876, the owners of certain shares of the capital stock of the National Albany Exchange Bank, a banking association duly incorporated under and by virtue of the act of Congress entitled "An act to provide for a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, established and doing business in the sixth ward of the city of Albany; and that after the said first day of September, 1876, the board of assessors of the city of Albany, which board was by law authorized to assess, for purposes of taxation, the taxable personal property of residents of said city of Albany and real property in said city, did, acting under color of an act of

the Legislature of the State of New York, entitled "An act authorizing the taxation of stockholders of banks and surplus funds of saving banks," passed April 23, 1866, being chapter 761 of the laws of 1866, assume and pretend to assess for taxation the said shares of said plaintiff and said other persons, estates, and corporations in the stock of said banking association, at one hundred dollars per share, being the par value thereof, deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of such banking association to the whole amount of the capital stock thereof, and said pretended assessment of said plaintiff and said other persons, estates, and corporations on their said shares of stock was added by said board of assessors to the assessment-roll of the sixth ward of the city of Albany, and said assessment-roll was delivered by said board of assessors to the supervisor of said sixth ward, who delivered the same to the board of supervisors of the county of Albany at their next meeting; and the said board of supervisors
2 thereupon assumed to assess, and carried out the taxes upon such pretended assessment thereon contained, and assumed to assess the said plaintiff and said other persons, estates, and corporations upon their said shares of stock in said banking association at the rate of $3\frac{4}{100}$ per centum on the said assessed valuation, and afterwards delivered the said pretended assessment-roll to the receiver of taxes of the city of Albany, with their warrant annexed thereto commanding the said receiver to collect from the several persons named in the said pretended assessment-roll the amount of the tax therein mentioned, and to pay over the same in the manner directed in said warrant, and the said receiver afterwards issued his warrant to the marshal of the city of Albany, commanding him to levy said tax with interest on the same, at the rate of twelve per cent per annum, to be calculated from the first day February, 1877, by distress and sale of the goods and chattels of the person upon whose property the same was apportioned, or in his possession, and to pay the same to said receiver, and to return said warrant within thirty days from the date thereof; that the said marshal thereupon proceeded to and did levy upon the goods and chattels and moneys of said plaintiff and said other persons, estates, and corporations for said taxes and interest, amounting to the sum first above named, which sum was paid by said marshal to said receiver of taxes, and by said receiver of taxes was paid to the treasurer of the county of Albany, on or about the 3d day of May, 1877, for the use of said county; that the names of said persons, estates, and corporations so assessed and taxed on their shares of stock in said banking association as aforesaid, together with the number of such shares on which each of them was so assessed and taxed, and the amount forcibly collected from each of them, and paid into the treasury of the county of Albany, are correctly stated in shedule C hereto annexed which is hereby made a part of this count; that neither plaintiff nor any of said persons, estates, or corporations named in said schedule except William J. Blackall, The Commerce Insurance Company, and Francis Vail were at the time of said pretended assessment

taxable inhabitants of said sixth ward, though most of them were taxable inhabitants of the city of Albany. That the said several persons other than plaintiff, and said corporations and the representatives of said estates, did, before the commencement of this action, duly assign to the plaintiff all their and each of their claims and demands against the county of Albany by reason of the premises, and that the plaintiff is now the holder and owner of all the claims and rights of action accruing to said persons, estates, and corporations by reason of the premises; that the plaintiff did, before the commencement of this action, demand of and from the county treasurer of said county the said sum so collected and paid into the county treasury as aforesaid, with the interest thereon from the time it was received by the said county treasurer, but the said treasurer did then, and has hitherto neglected and refused to pay the same.

And plaintiff says, upon information and belief, that the said pretended assessment was illegal and void. That under the Constitution and laws of the United States, said shares of stock were not liable to assessment and taxation by State authority, except so far as permission to make such assessment was given by section 5219, of the revised Statutes of the United States, which provides that nothing therein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but that the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere.

And plaintiff further says upon information and belief that the said shares were not included in the valuation of the personal property of the owner or holder of such shares in legally assessing taxes imposed by the authority of the State of New York; that no assessment was made against the said plaintiff, or said other persons, estates, or corporations upon their said shares of stock within the time required by law; that under the laws of the State of New York relating to the assessment and collection of taxes in the city of Albany, it was the duty of the board of assessors to complete
3 the assessment-rolls of the several wards of said city, on or before the first day of September in each year, and that said assessors had no authority or jurisdiction to make any assessment in any year after the first day of September; that no assessment was made against the said shareholders upon their said shares of stock until after the first day of September, 1876; and that the names of the said shareholders did not appear upon the said pretended assessment-roll of said sixth ward until after the first day of September, 1876; and after the pretended assessment of the taxable inhabitants of said sixth ward upon real and personal property, other than bank

stock, in said ward had been fully completed; that after said pretended assessment-roll had been so completed, and the time by law provided for reviewing said assessment-rolls and hearing the application of persons conceiving themselves aggrieved thereby, and for the correction and alteration thereof, had expired, a list of the said shareholders, with the number of shares owned by each of them, and the par value thereof (deducting the requisite sum for the assessed value of the real estate of said bank), was added at the end of said pretended assessment-roll, and was returned with it to the supervisor of said sixth ward as part of said pretended assessment-roll.

That the board of assessors of said city was required by the law of the State of New York relating to said city of Albany, in assessing the real estate in said ward for purposes of taxation to assess it at its full value, and also to assess the taxable personal property of each inhabitant of said city, after deducting his debts and his property invested in the stock of any corporation liable to be taxed for such stock at its full value, and the said assessors were by law required to make an oath or certificate, which should be written on each assessment-roll, to the effect, that with the exception of those cases in which the value of the said real estate had been changed by reason of proof produced before them, they had estimated the value of the real estate situated in the said ward at the sums which a majority of the assessors had decided to be the full and true value thereof, and at which they would appraise the same, in payment of a just debt, due from a solvent debtor, and also that the assessment-roll contained a true statement of the aggregate amount of the taxable personal estate of each and every person named in the said roll, over and above the amount of debts due from such person respectively, and excluding such stocks as were otherwise taxable, and such other property as was exempt by law from taxation at the full and true value thereof, according to their best judgment and belief. That under the laws of the State of New York, no assessment of real or personal property was valid, unless such certificate or oath was made by the assessors and written on such assessment-roll. That the said board of assessors, in the year 1876, failed to make such oath or certificate, and that no oath or certificate, such as was required by law, was written upon or attached to said pretended assessment-roll, but instead thereof an oath which failed in form or in substance to comply with the law, and was not in accordance with the said requirements thereof, was written thereon or attached thereto. That the said assessors did not, in fact, do their duty, as required by law, and did not assess real estate in said ward at its full value, but did assess it at a sum not to exceed from 40 to 60 per cent. of what in their judgment was such full and true value and failed to assess taxable personal property at its full and true value, and that the failure to make the oath or certificate required by statute was intentional on the part of said assessors, and was due to the fact that said assessors knew they had not done their duty as required by statute, and therefore could not make the oath as by statute required, and that by reason of the facts set forth, there was no valid assessment of any real or personal property in said city of Albany, in the year 1876,

and plaintiff is advised and believes that the said pretended assessments against the estate of Gould Blakeman, the estate of William Dickson, the estate of John Gould, the estate of Ebenezer Hill, the estate of James McNaughton, the estate of John T. Wendover, and the estate of Abraham Wing, were also, each of them, entirely unauthorized, illegal, and void, because no assessment was made, or attempted to be made against any person or corporation, of the value of the shares belonging to said respective estates.

And plaintiff further says, upon information and belief, that the said assessors did intentionally, by a rule prescribed by themselves, assess or assume to assess the said shares of stock in said National Albany Exchange Bank higher in proportion to their actual value, than other moneyed capital in the hands of individual citizens of the State of New York. That the rule adopted by said assessors was to assess all shares of stock in State and national banks in said city at par, irrespective of their actual value, making the requisite deduction for real estate owned by said banks. That such rule necessarily resulted in imposing upon the shares of said National Albany Exchange Bank a higher rate of taxation than was assessed upon other moneyed capital. That there were in said sixth ward of said city at the time of said assessment several banks, State and national, and that the actual value of the stock of said banks varied, that of the shares of stock in the said National Albany Exchange Bank being considerably less than the value of the stock of most of the other banks in said city; that by reason of said rule acted upon by said assessors, as aforesaid, and also by reason of the fact that no legal or valid tax was assessed upon other moneyed capital in said city, the said pretended assessment was in violation of the restriction contained in section 5219 of the Revised Statutes of the United States. That said pretended assessment of said shares was at a greater rate than the average rate imposed, or attempted to be imposed, upon other moneyed capital in said ward or city in the year 1876; and that for all the reasons above mentioned the said pretended assessment was illegal and void, and the money thereby collected was wrongfully collected and paid into the county treasury, and belonged of right to the said plaintiff and said other persons, corporations, and estates, and not to said county.

Second. That the county of Albany is a body politic and corporate, created by and under the laws of the State of New York, and that its powers can only be exercised by the defendant, and that under the laws of the State of New York said county can sue and be sued only in the name of the board of supervisors thereof, and that the said county is liable to the plaintiff in the sum of seven thousand three hundred and fifty-seven dollars and ninety-four cents ($7,357.94), with interest thereon from the 17th day of April, 1878, for money wrongfully taken from the assignors of the plaintiff, and wrongfully received and held by said county of Albany in the manner following—that is to say: Certain persons, estates, and corporations named in the schedule hereinafter referred to, were, on the first day of September, 1877, the owners of certain shares of the capital stock of the National Albany Exchange Bank, a banking association duly

incorporated under the laws of the United States, as in the first count herein alleged, established and doing business in the sixth ward of the city of Albany; and that on or about the said first day of September, 1877, the board of assessors of the city of Albany, which board was by law authorized to assess for purposes of taxation the taxable personal property of residents of said city of Albany and real property in said city, did, acting under color of the act of the Legislature of the State of New York, in said first count mentioned, being chapter 761 of the laws of 1866, assume and pretend to assess for taxation the said shares of said persons, estates, and corporations, in the stock of said banking association at one hundred dollars per share, being the par value thereof, deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of such banking association to the whole amount of the capital stock thereof, and said pretended assessment of said persons, estates, and corporations on their said shares of stock was included by said board of assessors in the assessment-roll of the sixth ward of the city of Albany, and said assessment-roll was delivered by said board of assessors to the supervisor of said sixth ward, who delivered the same to the board of supervisors of the county of Albany at their next meeting; and the said board of supervisors thereupon assumed to assess and carried out the taxes upon such pretended assessment therein contained, and assumed to assess the said persons, estates, and corporations upon their said shares of stock in said banking association at the rate of $3\frac{2}{100}$ per centum on the said assessed valuation, and afterward delivered the said pretended assessment-roll to the receiver of taxes of the city of Albany, with their warrant annexed thereto, commanding the said receiver to collect from the several persons named in the said pretended assessment-roll the amount of the tax therein mentioned, and to pay over the same in the manner directed in said warrant, and the said receiver afterward issued his warrant to the marshal of the city of Albany, commanding him to levy said tax with interest on the same, at the rate of twelve per cent. per annum, to be calculated from the first day of February, 1878, by distress and sale of the goods and chattles of the person upon whose property the same was apportioned, or in his possession, and to pay the same to said receiver and to return said warrant within thirty days after the date thereof; that the said marshal thereupon proceeded to and did levy upon the goods and chattels and moneys of said persons, estates, and corporations for said taxes and interest, which sum was paid by said marshal to said receiver of taxes and by said receiver of taxes was paid to the treasurer of the county of Albany, on or about the 17th day of April, 1878, for the use of said county; that the names of said persons, estates, and corporations so assessed and taxed on their shares of stock in said banking association as aforesaid, together with the number of such shares on which each of said persons, estates, and corporations was so assessed and taxed and the amount forcibly collected from each of them, and paid into the treasury of the county of Albany, are correctly stated in Schedule D hereto annexed, which is hereby made a part of this count. That none of

said persons, estates, and corporations named in said schedule, except William J. Blackall, The Commerce Insurance Company, and Francis Vail, were at the time of said pretended assessment taxable inhabitants of said sixth ward, though most of them were taxable inhabitants of the city of Albany. That the said several persons and corporations, and the representatives of said estates did duly assign to the plaintiff all their and each of their claims and demands against the county of Albany by reason of the premises, and that the plaintiff is now the holder and owner of all the claims and rights of action accruing to said persons, estates, and corporations by reason of the premises; that the plaintiff did before the commencement of this action demand of and from the county treasurer of said county the said sum so collected and paid into the county treasury as aforesaid, with the interest thereon from the time it was received by the said county treasurer, but the said treasurer did then and has hitherto neglected and refused to pay the same.

And plaintiff says, upon information and belief, that the said pretended assessment was illegal and void. That under the Constitution and laws of the United States said shares of stock were not liable to assessment and taxation by State authority, except so far as permission to make such assessment was given by section 5219 of the Revised Statutes of the United States, as in the first count herein set forth.

And the plaintiff further says, upon information and belief, that the said shares were not included in the valuation of the personal property of the owner or holder of such shares in legally assessing taxes imposed by the authority of the State of New York; that no assessment was made against the said persons, estates, and corporations or any of them upon their said shares of stock within the time required by law; that under the laws of the State of New York relating to the assessment and collection of taxes in the city of Albany, it was the duty of the board of assessors to complete the assessment rolls of the several wards of said city on or before the first day of September in each year, and that said assessors had no authority or jurisdiction to make any assessment in any year after the first day of September; that no assessment was made against the said shareholders upon their said shares of stock until after the first day of September, 1877, and that the names of the said shareholders did not appear upon the said pretended assessment roll of said sixth ward until after the first day of September, 1877, and after the pretended assessment of the taxable inhabitants of said sixth ward upon real and personal property, other than bank stock in said ward, had been fully completed; that after said pretended assessment roll had been so completed and the time by law provided for reviewing said assessment rolls, and hearing the application of persons conceiving themselves aggrieved thereby, and for the correction and alteration thereof had expired a list of the said shareholders, with the number of shares owned by each of them and the par value thereof (deducting the requisite sum for the assessed value of the real estate of said bank), was added at the end of said pretended as-

sessment roll, and was returned with it to the supervisor of said sixth ward as part of said pretended assessment roll.

That the board of assessors of said city was required by the law of the State of New York, relating to said city of Albany, in assessing the real estate in said city for purposes of taxation to assess it at its full value, and also to assess the taxable personal property of each inhabitant of said city, after deducting his debts and his property invested in the stock of any corporation liable to be taxed for such stock at its full value, and the said assessors were by law required to make an oath or certificate, which should be written on the assessment roll of each ward in said city, to the effect stated and alleged in the first count herein. That under the laws of the State of New York no assessment of real or personal property was valid, unless such certificate or oath is made
6 by the assessors, and written on such assessment roll. That the said board of assessors failed to make such oath or certificate, and that no oath or certificate such as was required by law was written upon or attached to said pretended assessment roll, or to the assessment roll of any ward in said city, in the year 1877, but instead thereof, an oath, which failed in form or in substance to comply with the law, and was not in accordance with the said requirements thereof, was written thereon or attached thereto. That the said assessors did not, in fact, do their duty as required by law, and did not assess real estate in said ward or in said city at its full value, but did assess it at a sum not to exceed from 40 to 60 per cent. of what, in their judgment, was such full and true value, and failed to assess taxable personal property at its full and true value, and that the failure to make the oath or certificate required by statute was intentional on the part of said assessors, and was due to the fact that said assessors knew they had not done their duty, as required by statute, and therefore could not make the oath by statute required, and that by reason of the facts above set forth there was no valid assessment of any real or personal property in said sixth ward, or in any ward of said city in the year 1877, and plaintiff is advised and believes that the said pretended assessments against the estate of Gould Blakeman, the estate of William Dickson, the estate of John Gould, the estate of Ebenezer Hill, the estate of James McNaughton, the estate of Peter McNaughton, and the estate of Abraham Wing, were also, each of them, entirely unauthorized, illegal and void, because no assessment was made, or attempted to be made, against any person or corporation of the value of the shares belonging to said respective estates.

And plaintiff further says, upon information and belief, that the said assessors did intentionally, by a rule prescribed by themselves, assess, or assume to assess, the said shares of stock in said National Albany Exchange Bank higher in proportion to their actual value than other moneyed capital in the hands of individual citizens of the State of New York. That the rule adopted by said assessors was to assess all shares of stock in State and National banks in said city at par, irrespective of their actual value, making the requisite deduction for real estate owned by said banks. That such rule necessarily

resulted in imposing upon the shares of said National Albany Exchange Bank a higher rate of taxation than was assessed upon the other moneyed capital. That there were in said sixth ward of said city at the time of said assessment several banks, State and National, and that the actual value of the stock of said banks varied, that of the shares of stock in the said National Albany Exchange Bank being considerably less than the value of the stock of most of the other banks in said city. That by reason of said rule, acted upon by said assessors, as aforesaid, and also by reason of the fact that no legal or valid tax was assessed upon other moneyed capital in said city, the said pretended assessment was in violation of the restriction contained in section 5219 of the Revised Statutes of the United States. That said pretended assessment of said shares was at a greater rate than the average rate imposed, or attempted to be imposed, upon other moneyed capital in said ward or city in the year 1877, and that for all the reasons above mentioned the said pretended assessment was illegal and void, and the money thereby collected was wrongfully collected and paid into the county treasury, and belonged of right to the said persons, estates, and corporations, and not to said county.

Third. That the county of Albany is a body politic and corporate, created by and under the laws of the State of New York, and that its powers can only be exercised by the defendant, and that under the laws of said State of New York said county can sue and be sued only in the name of the board of supervisors thereof, and that the said county is liable to the plaintiff in the sum of six thousand two hundred and forty-three dollars and twenty cents ($6,243.20), with interest thereon from the 22d day of April, 1879, for money wrongfully taken from the assignors of the plaintiff, and wrongfully received and held by said county of Albany in the manner following, that is to say, certain persons, estates and corporations named in the schedule hereinafter referred to, were on the first day of September, 1878, the owners of certain shares of the capital stock of the National Albany Exchange Bank, a banking association duly incorporated under the laws of the United States, as in the first count herein alleged, established and doing business in the sixth ward of the city of Albany, and that on or about the said first day of September, 1878, the board of assessors of the city of Albany, which board was by law authorized to assess for purposes of taxation the taxable personal property of residents of said
7 city of Albany, and real property in said city, did, acting under color of the act of the Legislature of the State of New York in said first count mentioned, being chapter 761 of the laws of 1866, assume and pretend to assess for taxation the said shares of said persons, estates, and corporations in the stock of said banking association at one hundred dollars per share, being the par value thereof, deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of such banking association to the whole amount of the capital stock thereof, and said pretended assessments of said persons, estates, and corporations on their said shares of stock was included by said board

of assessors in the assessment-roll of the sixth ward of the city of Albany, and said assessment-roll was delivered by said board of assessors to the supervisor of said sixth ward, who delivered the same to the board of supervisors of the county of Albany at their next meeting; and the said board of supervisors thereupon assumed to assess and carried out the taxes upon such pretended assessment therein contained, and assumed to assess the said persons, estates, and corporations upon their said shares of stock in said banking association at the rate of $2\frac{4}{100}$ per centum on the said assessed valuation, and afterward delivered the said pretended assessment-roll to the receiver of taxes of the city of Albany, with their warrant annexed thereto commanding the said receiver to collect from the several persons named in the said pretended assessment-roll the amount of the tax therein mentioned, and to pay over the same in the manner directed in the said warrant, and the said receiver afterward issued his warrant to the marshal of the city of Albany, commanding him to levy said tax, with interest on the same at the rate of twelve per cent. per annum, to be calculated from the first day of February, 1879, by distress and sale of the goods and chattels of the person upon whose property the same was apportioned, or in his possession, and to pay the same to said receiver, and to return said warrant within thirty days after the date thereof; that the said marshal thereupon proceeded to and did levy upon the goods and chattels and moneys of said persons, estates, and corporations for said taxes and interest, which sum was paid by said marshal to said receiver of taxes, and by said receiver of taxes was paid to the treasurer of the county of Albany, on or about the 22d day of April, 1879, for the use of said county; that the names of said persons, estates, and corporations so assessed and taxed on their shares of stock in said banking association as aforesaid, together with the number of such shares on which each of them was so assessed and taxed, and the amount forcibly collected from each of them and paid into the treasury of the county of Albany, are correctly stated in Schedule E hereto annexed, which is hereby made a part of this count; that none of said persons, estates, and corporations named in said schedule, except William J. Blackall, The Commerce Insurance Company, and Francis Vail, were at the time of said pretended assessment taxable inhabitants of said sixth ward, though most of them were taxable inhabitants of the city of Albany. That the said several persons and corporations and the representatives of said estates did duly assign to the plaintiff all their and each of their claims and demands against the county of Albany by reason of the premises, and that the plaintiff is now the holder and owner of all the claims and rights of action accruing to said persons, estates, and corporation by reason of the premises. That the plaintiff did, before the commencement of this action, demand of and from the county treasurer of said county the said sum so collected and paid into the county treasury as aforesaid, with the interest thereon from the time it was received by the said county treasurer, but the said treasurer did then, and has hitherto, neglected and refused to pay the same.

And plaintiff says, upon information and belief, that the said pre-

tended assessment was illegal and void. That under the Constitution and laws of the United States said shares of stock were not liable to assessment and taxation by State authority, except so far as permission to make such assessment was given by section 5219 of the Revised Statutes of the United States, as in the first count herein set forth.

And plaintiff further says, upon information and belief, that the said shares were not included in the valuation of the personal property of the owner or holder of such shares in legally assessing taxes imposed by the authority of the State of New York; that no assessment was made against the said persons, estates, and corporations, or any of them, upon their said shares of stock, within the time required by law; that under the laws of the State of New
8 York relating to the assessment and collection of taxes in the city of Albany, it was the duty of the board of assessors to complete the assessment-rolls of the several wards of said city on or before the first day of September in each year, and that said assessors had no authority or jurisdiction to make any assessment in any year after the first day of September; that no assessment was made against the said shareholders upon their said shares of stock until after the first day of September, 1878, and that the names of the said shareholders did not appear upon the said pretended assessment-roll of said sixth ward until after the first day of September, 1878, and after the pretended assessment of the taxable inhabitants of said sixth ward, upon real and personal property other than bank stock in said ward, had been fully completed; that after said pretended assessment-roll had been so completed, and the time by law provided for reviewing said assessment-rolls and hearing the applications of persons conceiving themselves aggrieved thereby, and for the correction and alteration thereof, had expired, a list of the said shareholders, with the number of shares owned by each of them and the par value thereof (deducting the requisite sum for the assessed value of the real estate of said bank), was added at the end of said pretended assessment-roll, and was returned with it to the supervisor of said sixth ward as part of said pretended assessment-roll. That the board of assessors of said city was required by the law of the State of New York relating to said city of Albany, in assessing the real estate in said city for purposes of taxation, to assess it at its full value, and also to assess the taxable personal property of each inhabitant of said city, after deducting his debts and his property invested in the stock of any corporation liable to be taxed for such stock, at its full value, and the said assessors were by law required to make an oath or certificate, which should be written on the assessment-roll of each ward of said city, to the effect stated and alleged in the first count herein. That under the laws of the State of New York no assessment of real or personal property was valid unless such certificate or oath is made by the assessors and written on such assessment-roll. That the said board of assessors failed to make such oath or certificate, and that no oath or certificate such as was required by law was written upon or attached to said pretended assessment-roll, or to the assessment-roll of any ward in said city in the year 1878; but instead thereof

an oath, which failed in form and in substance to comply with the law, and was not in accordance with the said requirements thereof, was written thereon or attached thereto. That the said assessors did not in fact do their duty as required by law, and did not assess real estate in said ward or in said city at its full value, but did assess it at a sum not to exceed from 40 to 60 per cent. of what, in their judgment, was such full and true value, and failed to assess taxable personal property at its full and true value, and that the failure to make the oath or certificate required by statute was intentional on the part of said assessors, and was due to the fact that said assessors knew they had not done their duty as required by statute, and, therefore, could not make the oath by statute required, and that, by reason of the facts above set forth, there was no valid assessment of any real or personal property in said sixth ward, or in any ward of said city, in the year 1878.

And plaintiff is advised and believes that the pretended assessments against the estate of Gould Blakeman, estate of William Dickson, the estate of John Gould, the estate of Ebenezer Hill, the estate of James McNaughton, the estate of John V. L. Pruyn, the estate of James Roy, and the estate of Abraham Wing, were also, each of them, entirely unauthorized, illegal, and void, because no assessment was made, or attempted to be made, against any person or corporation of the value of the shares belonging to said respective estates.

And plaintiff further says, on information and belief, that the said assessors did intentionally, by a rule prescribed by themselves, assess, or assume to assess, the said shares of stock in said National Albany Exchange Bank higher, in proportion to their actual value than other moneyed capital in the hands of individual citizens of the State of New York. That the rule adopted by said assessors was to assess all shares of stock in State and National banks in said city at par, irrespective of their actual value, making the requisite deduction for real estate owned by said banks. That such rule necessarily resulted in imposing upon the shares of said National Albany Exchange Bank a higher rate of taxation than was assessed upon other moneyed capital. That there were in said sixth ward of said city at the time of said assessment several banks, State and
9 National, and that the actual value of the stock of said banks varied, that of the shares of stock in the said National Albany Exchange Bank being considerably less than the value of the stock of most of the other banks in said city. That by reason of said rule acted upon by said assessor as aforesaid, and also by reason of the fact that no legal or valid tax was assessed upon other moneyed capital in said city, the said pretended assessment was in violation of the restriction contained in section 5219 of the Revised Statutes of the United States. That said pretended assessment of said shares was at a greater rate than the average rate imposed, or attempted to be imposed, upon other moneyed capital in said ward or city in the year 1878, and that for all the reasons above mentioned the said pretended assessment was illegal and void, and the money thereby collected was wrongfully collected and paid into the county treas-

ury, and belonged of right to the said persons, estates, and corporations, and not to said county.

Wherefore the said plaintiff demands judgment against the defendant in the sum of twenty-two thousand six hundred and twenty-five dollars and eighty cents ($22,625.80), with interest thereon as follows: On $9,024.66, from the 3rd day of May, 1877; on $7,357.94, from the 17th day of April, 1878, and on $6,243.20, from the 22d day of April, 1879, together with the costs of this action.

HALE & BULKLEY,
Attorneys for Plaintiff.
25 North Pearl street, Albany, N. Y.

CITY AND COUNTY OF ALBANY, *ss:*

Chauncey P. Williams, the above-named plaintiff, being duly sworn, says that he has read the foregoing complaint, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. P. WILLIAMS.

Sworn to before me, this 20th day of June, 1883.

WM. SWAIN,
Com'r of Deeds, Albany, N. Y.

SCHEDULE C.

Names of stockholders.	No. of shares.	Tax collected.
Mary E. Allen	25	$78 07
Estate of D. W. Bender	50	156 14
William M. Bender	50	156 14
William J. Blackall	14	43 71
Anson H. Blakeman	10	31 22
Estate of Gould Blakeman	10	31 22
Martha P. Butler	10	31 22
Nicholas Clapper	11	34 34
Amelia A. Cobb	50	156 14
Thomas B. Cole	13	40 60
Thomas Comstock	20	62 44
Commerce Insurance Company	80	249 76
Theodore F. Cornell	25	78 07
Ann Darling	10	31 22
Sarah Dey Ermand	5	15 61
Est. Wm. Dickson	10	31 22
Edward A. Durant	50	156 14
Gideon D. Eames	30	93 66
Milo R. Eames	20	62 44
Hester S. Emerson	10	31 22
John T. Foote	10	31 22
Azuba G. Fairchild	5	15 61
Daniel H. Gardner	4	12 49
Charlotte Gardner	1	3 13

Names of stockholders.	No. of shares.	Tax collected.
Sarah M. Gardner	2	86 24
William Gould	320	999 33
Sarah M. Gould	2	6 25
Thos. H. Greer	25	78 07
Thos. H. Greer, Ex'r	25	78 07
Estate of John Gould	8	24 97
Sylvester Hale	122	381 00
Estate of Ebenezer Hill	70	218 60
Harriet Hilton	10	31 22
Sarah A. Lansing	15	46 84
Carolina M. Lathrop	10	31 22
Charles B. Lansing	25	78 07
Mary L. G. Lewis	1	3 12
Shiboleth B. McCoy	250	780 72
James McElroy	5	15 61
William McElroy	100	312 30
John McElroy	10	31 22
Peter Monteath	10	31 22
Estate of James McNaughton	50	156 14
Lansing Merchant	60	187 37
Henry T. Mesick	60	187 37
Mary Patrick	10	31 22
Spencer L. B. Peck	10	31 22
Nancy L. Peck	40	124 91
Henry C. Peck	10	31 22
Samuel L. Peck	10	31 22
Myron R. C. Peck	10	31 22
Estate of Amos Pilsbury, (C. P. Williams & A. V. DeWitt, ex'rs)	70	218 60
John V. L. Pruyn	145	452 82
Robert C. Pruyn	50	156 14
Agnes Pruyn	45	140 53
James Roy	10	31 22
Adam Shields	3	9 37
Eliza F. Spoor	10	31 22
William G. Thomas	100	312 30
Lemon Thomson	50	156 14
Francis Vail	15	46 84
Catharine Van Schaack	10	31 22
James C. Visscher	5	15 61
Thomas E. Van Loon	10	31 22
Edward Visscher	13	37 47
John L. Voorhees	10	31 22
Clement Warren	20	62 44
Estate of John T. Wendover	30	93 66
George P. Wilson	15	46 84
Abram F. Wilson	20	62 44
Josiah B. Williams	50	156 14
Estate of Abram Wing	20	62 44
Henry H. Bulkley	20	62 44

SCHEDULE D.

Names of stockholders.	No. of shares.	Tax collected.
Mary E. Allen	25	873 44
Estate of C. W. Bender	50	146 88
William M. Bender	50	146 88
William J. Blackall	14	41 12
Anson H. Blakeman	10	29 36
Estate of Gould Blakeman	10	29 36
Martha P. Butler	10	29 36
Nicholas Clapper	11	32 30
Amelia A. Cobb	50	146 88
11 Thomas B. Cole	13	38 18
Thomas Comstock	20	58 74
Commerce Insurance Co.	80	235 00
Theodore F. Cornell	25	73 44
Mary A. Darling	10	29 36
Sarah Dey Ermand	5	15 68
Est. of Wm. Dickson	10	29 36
Edward A. Durant	50	146 88
Gideon D. Eames	30	88 12
Milo R. Eames	20	58 74
Hester S. Emerson	10	29 36
John T. Foote	10	29 36
Azuba G. Fairchild	5	14 68
Daniel H. Gardner	4	11 74
Charlotte Gardner	1	2 92
Sarah M. Gardner	2	5 86
William Gould	310	910 64
Sarah M. Gould	2	5 86
Thos. H. Greer	25	73 44
Thos. H. Greer, ex'r	25	73 44
Est. of John Gould	8	23 50
William Gould, Jr.	10	29 36
Sylvester Hale	122	358 38
Estate of Ebenezer Hill	70	205 62
Harriet Hilton	10	29 36
Sarah A. Lansing	15	44 06
Carolina M. Lathrop	10	29 36
Charles B. Lansing	25	73 44
Mary L. G. Lewis	1	2 92
Shiboleth B. McCoy	250	734 40
James McElroy	5	14 68
Wm. McElroy	100	293 76
Peter Monteith	10	29 36
Est. of James McNaughton	50	146 88
Est. of Peter McNaugton	50	146 88
Lansing Merchant	60	176 24
Henry T. Mesick	60	176 24
Mary Patrick	10	29 36
Spencer S. B. Peck	10	29 36

Names of stockholders.	No. of shares.	Tax collected.
Henry C. Peck	10	$29 36
Samuel S. Peck	10	29 36
Myron R. C. Peck	10	29 36
Est. of Amos Pilsbury (C. P. Williams and A. V. DeWitt, executors)	70	205 62
John V. L. Pruyn	145	425 94
Robert C. Pruyn	10	29 36
Agnes Pruyn	45	132 18
James Roy	10	29 36
Adam Shields	3	8 80
Eliz. F. Spoor	10	29 36
Wm. G. Thomas	100	293 76
Lemon Thomson	50	146 88
Francis Vail	15	44 06
Catharine Van Schaick	10	29 36
James C. Visscher, ex'r	5	14 68
Thomas E. Van Loon	10	29 36
Edward Visscher	12	35 24
John L. Voorhees	10	29 36
Mrs. N. L. Van Alstyne	40	117 50
Richard Van Rensselaer	1	2 92
Richard Van Rensselaer, admin.	6	17 62
Richard Van Rensselaer, ex'r	5	14 68
Clement Warren	20	58 74
S. H. Wendover	30	88 12
Geo. P. Wilson	15	44 06
Abram F. Wilson	20	58 74
Josiah B. Williams	50	146 88
Est. of Abram Wing	20	58 74

SCHEDULE E.

Mary E. Allen	25	65 16
Mrs. Mariah Bender	50	130 34
William M. Bender	50	130 34
William J. Blackall	14	36 48
Anson H. Blakeman	10	26 06
Estate of Gould Blakeman	10	20 06
Martha P. Butler	10	26 06
Sarah A. Clapper	11	28 66
12 Amelia A. Cobb	50	130 34
Thomas B. Cole	13	33 89
Phœbe Comstock	20	52 14
Commerce Insurance Co.	80	208 56
Theodore F. Cornell	25	65 16
Ann Darling	10	26 06
Sarah Dey Ermand	5	13 02
Estate of Wm. Dixon	10	26 06
Edward A. Durant	50	130 34
Milo E. Eames	30	78 20

Names of shareholders.	No. of shares.	Tax collected.
Milo R. Eames	20	$52 14
Hester S. Emerson	10	26 06
Azuba G. Fairchild	5	13 02
Daniel H. Gardner	4	10 43
Charlotte Gardner	1	2 60
Sarah M. Gardner	2	5 21
William Gould	310	808 20
Sarah M. Gould	2	5 22
Thomas H. Greer	25	65 16
Thomas H. Greer, ex'r	25	65 16
Estate of John Gould	8	20 84
William Gould, Jr.	10	26 06
Sylvester Hale	22	57 35
Oscar L. Hasey	10	26 06
Estate of Ebenezer Hill	70	182 48
Harriet Hilton	10	26 06
Sarah A. Lansing	15	39 10
Carolina M. Lathrop	10	26 06
Charles B. Lansing	25	65 16
Mary L. G. Lewis	1	2 59
Shiboleth B. McCoy	250	651 78
James McElroy	5	13 02
William McElroy	100	260 70
Peter Monteath	10	26 06
Estate of James McNaughton	50	130 34
Henry P. McNaughton	16	41 70
Lansing Merchant	60	156 42
Henry T. Mesick	60	156 42
Jessie McN. Miller	16	41 70
Mary Patrick	10	26 06
Spencer S. B. Peck	10	26 06
Henry C. Peck	10	26 06
Samuel S. Peck	10	26 06
Myron R. C. Peck	10	26 06
Estate of Amos Pilsbury (C. P. Williams and A. V. DeWitt, executors)	70	182 48
Estate of John V. L. Pruyn	145	378 02
Robert C. Pruyn	10	26 06
Agnes Pruyn	45	117 32
Estate of James Roy	10	26 06
Adam Shields	3	7 80
Eliz. F. Spoor	10	26 06
Wm. G. Thomas	100	260 70
Lemon Thomson	50	130 34
Francis Vail	15	39 10
Catharine Van Schaack	10	26 06
James C. Visscher, ex'r	5	13 02
Thomas E. Van Loon	10	26 06
Edward Visscher	12	31 28
John L. Vorhees	10	26 06

Names of Stockholders.	No. of shares.	Tax collected.
Mrs. N. L. Van Alstyne	40	$104 28
Richard Van Rensselaer	1	2 59
Richard Van Rensslaer, adm'r	6	15 64
Richard Van Rensslaer, ex'r	5	12 78
Clemen Warren	20	58 74
S. H. Wendover	30	78 20
Geo. P. Wilson	15	39 10
Abram F. Wilson	20	52 14
Josiah B. Williams	50	130 34
Estate of Abram Wing	20	66 32
Jennie McN. Wright	18	46 93

[Indorsed:] Summons & complaint filed.

13 Supreme Court, Albany County.

CHAUNCEY P. WILLIAMS
agst.
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The defendant for answer to the complaint herein—

First. Denies each and every allegation in the complaint contained.

Second. And for another further and separate answer to the complaint, defendant avers that under and pursuant to an act of the Legislature of the State of New York, duly passed April 30, 1883, and being chapter 345 of the Laws of 1883, the assessments and taxes referred to in the complaint were duly legalized and confirmed.

Third. And for a third separate and further defense, the defendant avers that under and pursuant to the act last aforesaid, due and proper notice was given by the board of assessors of the city of Albany, as in and by said act, and especially section two thereof, is provided, and that pursuant to said notice the plaintiff herein came before said assessors and presented and made a claim and demand for a cancellation and reduction of the assessments and taxations referred to in the complaint; that said assessors heard said claim and decided upon the same, and granted a reduction and allowance to said plaintiff of a portion of his claim and demand; that pursuant to such decision and determination the amount thereof was duly certified to the board of supervisors of the county of Albany; that the amount thereof was duly raised by the said board by taxation, and was paid to and received by said plaintiff herein; that by reason of the facts aforesaid plaintiff did ratify and acknowledge the the validity of said chapter 345 of the Laws of 1883.

Wherefore the defendant asks that the complaint be dismissed with costs.

PECKHAM & ROSENDALE,
Attorneys for Defendant.

Office and post-office address, Albany Savings Bank building, Albany, N. Y.

[Endorsed:] Answer.

14 Supreme Court of the State of New York, County of Albany.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

To the supreme court of the State of New York:

The petition of Chauncey P. Williams, the above-named plaintiff, respectfully shows—

I. That the matter and amount in dispute in the above-entitled action exceeds, exclusive of costs, the sum of five hundred dollars.

II. That the said action is one arising under the Constitution and laws of the United States, in this, to wit, that the action is brought to recover moneys alleged to have been wrongfully collected of the plaintiff, and of the assignors of the plaintiff, under a pretended assessment made by the assessors of the city of Albany against the plaintiff and the assignors of the plaintiff named in the complaint herein upon their shares of stock in the National Albany Exchange Bank, a banking association organized under the laws of the United States, and it is alleged in said complaint that the said pretended assessments were illegal and void, for the reason that they
15 were in violation of the laws of the United States, and especially of the restriction contained in § 5219 of the Revised Statutes of the United States.

That the defendant's answer herein was served on or about the 16th day of February, 1884, and that the said answer alleges that the said assessments have been legalized and confirmed by an act of the Legislature of the State of New York, being chapter 345 of the laws of 1883, and this plaintiff is advised and believes that the said law of the State of New York is unconstitutional and void, for the reason that it violates the restriction contained in said section 5219 of the Revised Statutes of the United States, and also because it is in conflict with [the] Constitution of the United States, and especially of that part of the Constitution known as the 14th amendment thereof.

That the said action has never been noticed for trial, and that no answer was served therein until the 16th day of February, 1884; that the plaintiff and defendant are both citizens of the State of New York.

And your petitioner offers herewith a bond, with a good and sufficient surety, for his entering in the circuit court of the United States for the northern district of New York, wherein said action is pending, on the first day of the next session of said court, a copy
16 of the record in this suit, and for paying all costs that might be awarded by said circuit court if said court shall hold that this action was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record

herein to be removed into said circuit court of the United States in and for the northern district of New York.

Dated March 3rd, 1884.

C. P. WILLIAMS,
Petitioner.
HALE AND BULKLEY,
Attorneys for Petitioner,
25 North Pearl street, Albany, N. Y.

STATE OF NEW YORK, } ss:
City and County of Albany, }

Chauncey P. Williams, being duly sworn, says: That he is the plaintiff in the above-entitled action, and has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the
17 matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. P. WILLIAMS.

Sworn to before me, this 4th day of March, 1884.
[SEAL.] WM. E. CORNWELL,
Notary Public.

[Endorsed]: Supreme Court. Chauncey P. Williams *against* The Board of Supervisors of the County of Albany. Copy. Petition to remove cause to U. S. circuit court for northern district of N. Y. Hale and Bulkley, att'ys for petitioner, 25 North Pearl street, Albany, N. Y. Read, March 7th, 1884. T. R. W.

18 Know all men by these presents, That we, Chauncey P. Williams, as principal, and Jonas H. Brooks, as surety, are held and firmly bound unto The Board of Supervisors of the County of Albany in the penal sum of five hundred dollars, for which payment well and truly to be made unto the said The Board of Supervisors of the County of Albany, its successors and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, this 4th day of March, 1884.

The condition of this obligation is such that if the said Chauncey P. Williams, plaintiff in an action now pending in the supreme court of the State of New York, wherein the said The Board of Supervisors of the County of Albany is defendant, shall, on the first day of the next session or term of the circuit court of the United States for the northern district of New York, enter a copy of the record in said action, and shall well and truly pay all costs that may [be] awarded by said circuit court of the United States, if said court shall hold that said action was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, to remain in full force and virtue.

C. P. WILLIAMS. [L. S.]
J. H. BROOKS. [L. S.]

19 STATE OF NEW YORK, } ss:
City & County of Albany, }

On this 4th day of March, 1884, before me personally came Chauncey P. Williams and Jonas H. Brooks, to me personally known to be the persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

[SEAL.] WM. E. CORNELL,
Notary Public.

STATE OF NEW YORK, } ss:
City & County of Albany, }

Jonas H. Brooks, being duly sworn, says: That he is a resident and freeholder in the State of New York, residing in the city of Albany, and that he is worth the sum of one thousand dollars, over and above all debts or liabilities that he owes or has incurred, and besides property exempt by law from execution.

J. H. BROOKS.

Sworn to before me, this 4th day of March, 1884.

[SEAL.] WM. E. CORNELL,
Notary Public.

20 [Endorsed:] Chauncey P. Williams and Jonas H. Brooks to The Board of Supervisors of the County of Albany. Copy. Bond. I approve of the within bond both as to form and sufficiency of sureties. March 7, 1884. T. R. Westbrook, Jus. Sup. Court.

21 At a special term of the supreme court of the State of New York, held at the city hall, in the city of Albany, on the 7th day of March, 1884:

Present: Hon. T. R. Westbrook, justice.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

On reading and filing the petition of the above-named plaintiff, for the removal of the above-entitled action to the circuit court of the United States in and for the northern district of New York, on the ground that the same is a suit arising under the Constitution and laws of the United States, and the bond of the said plaintiff with good and sufficient surety, for his entering in such circuit court, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, on motion of Hale and Bulkley, attorneys for said plaintiff, petitioner, it is ordered that said petition and bond be and the same are hereby accepted, and that this court proceed no further in this action, and that said action be and the same is hereby removed to the circuit court of the United States
22 for the northern district of New York.

(Indorsed:) Copy. Order removing action to U. S. circuit court. Clerk will enter the within order. March 7, 1884. T. R. Westbrook.

STATE OF NEW YORK, }
City and County of Albany, Clerk's Office, } *ss:*

I, William D. Strevell, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy record with the original thereof, filed in this office on the 8th day of March, 1884, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 8th day of March, 1884.

[L. S.] WM. D. STREVELL, *Clerk.*

(Indorsed:) U. S. circuit court, n. d. of N. Y. Filed Mar. 10, 1884. Wm. S. Doolittle, clerk.

23 At a term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at Utica on the tenth day of March, A. D. 1884.

Present: The Honorable William J. Wallace, judge.

CHAUNCEY P. WILLIAMS
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY. } No. 2523.

On reading and filing copies of papers of record in the supreme court of the State of New York, Albany county, in the above-entitled cause, and certified copies of the petition, bond, and order of removal of this cause from and out of said supreme court into this court—

Now, on motion of Messrs. Hale & Bulkley, it is ordered that the said cause be, and the same is hereby, entered in this court; that the appearance of the plaintiff herein by the said Hale & Bulkley, his attorneys, be, and the same is hereby, entered in this court; and that this cause proceed in this court in the same manner as if it had been brought in this court by original process against the above-named defendant.

24 United States Circuit Court, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

We hereby waive a jury trial in the above-entitled action, and consent that the issues therein be tried before Judge Wallace upon the facts admitted, together with the pleadings and other printed papers in said action.

Dated May 26, 1884.

HALE & BULKLEY,
Att'ys for Pl'ff.
PECKHAM & ROSENDALE,
Att'ys for Def'ts.

(Indorsed:) Consent to trial without jury.

(Original:) Filed May 20, 1884. Wm. S. Doolittle, clerk.

25 Circuit Court of the United States, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

This action having been tried before me without a jury, (a jury having been waived by the parties hereto), and the proofs and allegations of the parties having been heard, I find and decide as follows:

First. I find the facts admitted by the pleadings and by the stipulations of the parties herein.

Second. That the law, chapter 345 of the laws of 1883, a copy of which is set forth on pages 33 and 34 of the printed papers herein, was duly enacted by the Legislature of the State of New York, on the 30th day of April, 1883.

As conclusions of law, I decide:

1. That the assessments and taxes mentioned in the complaint herein were illegal, because not imposed in conformity to the laws of the State of New York.

2. That said assessments and taxes were not in violation of any of the provisions of the laws of the United States.

3. That the said act, chapter 345, of the laws of the State
26 of New York, for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided, and was not in violation of any provision of the Constitution or laws of the United States.

4. That the defendant is entitled to judgment herein.

WM. J. WALLACE.

(Indorsed:) Decision. Filed Aug. 25, 1884. Wm. S. Doolittle, clerk.

Exceptions.

27 Circuit Court of the United States, Northern District of New York.

CHAUNCEY P. WILLIAMS,
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The above-named plaintiff hereby excepts to the decision of the circuit court herein, as filed, and specifies the following exceptions thereto:

I. Plaintiff excepts to the finding and decision that the assessments and taxes referred to in the complaint herein were not in violation of any of the provisions of the laws of the United States.

II. Plaintiff further excepts to the finding and decision that the act, chapter 345 of the laws of the State of New York, for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided.

III. Plaintiff also excepts to the finding and decision that the said act, chapter 345 was not in violation of any of the provisions of the Constitution or laws of the United States.

IV. Plaintiff also excepts to the decision that the defendant is entitled to judgment in this action.

28 V. Plaintiff excepts to said decision, for that the court did not find and decide that the assessments and taxes mentioned in the complaint were in violation of the provisions of section 5219 of the Revised Statutes of the United States.

VI. Plaintiff also excepts to said decision, for that the court did not decide that the said act, chapter 345 of the laws of the State of New York for the year 1883, was in violation of the Constitution of the United States, and especially of the 14th article or amendment thereof.

VII. Plaintiff also excepts to said decision, for that the court did not decide that the said act, chapter 345 above mentioned, was void because it violated the provisions of said section 5219 of the Revised Statutes of the United States, by unlawfully assessing the shares of the plaintiff and his assignors in the National Albany Exchange Bank, in a manner not permitted by the laws of the United States, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

Dated, September 1st, 1884.

HALE & BULKLEY,
Attorneys for Plaintiff,
25 North Pearl Street, Albany, N. Y.

(Indorsed.) Exceptions to decision of circuit court. Filed Sept. 4, 1884. Wm. S. Doolittle, clerk.

29 *Judgment.*

United States Circuit Court, Northern District of New York.

CHAUNCEY P. WILLIAMS
vs. } 2523.
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

This cause having been removed from and out of the supreme court of the State of New York, Albany county, and into this court on the petition of plaintiff, and a jury trial having been waived, and the issues having been submitted to the Hon. William J. Wallace, circuit judge, at a term of this court held at Utica on the 18th day of March, 1884, and his decision herein having been duly rendered and filed on the 25th day of August, 1884, wherein and whereby it is decided that defendant is entitled to judgment herein, and the defendant's costs and disbursements having been taxed by the clerk in the sum of forty-eight $\frac{85}{100}$ dollars—

Now, therefore, on motion of Peckham & Rosendale, attorneys for defendant, it is—

Ordered and adjudged that plaintiff recover nothing against the defendant in this action, and that defendant, The Board of Super-

visors of the County of Albany, recover of the plaintiff, Chauncey P. Williams, the sum of forty-eight $\frac{85}{100}$ dollars, its costs and disbursements herein, so as aforesaid taxed.

Judgment signed and entered, this 10th day of September, A. D. 1884, at 11 o'clock in the forenoon.

W. S. DOOLITTLE,
Clerk.

(Indorsed:) United States circuit court, northern district of New York. Chauncey P. Williams *vs.* The Board of Supervisors of the County of Albany. Judgment roll. Peckham & Rosendale, defendant's att'ys. Costs, $48.85. Filed Sept. 10th, 1884, 11 a. m. W. S. Doolittle, clerk.

31 Circuit Court of the United States, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

This action was brought in the supreme court of the State of New York to recover back certain taxes alleged to have been wrongfully collected from certain stockholders in the National Albany Exchange Bank during the years eighteen hundred and seventy-seven, eighteen hundred and seventy-eight, and eighteen hundred and seventy-nine, and paid into the treasury of the county of Albany. It was duly removed into this court upon a petition of the plaintiff, on the grounds that it was a suit arising under the Constitution and laws of the United States. The action came on for trial in December, 1883, before the Hon. William J. Wallace, circuit judge of the United States for the second circuit, without a jury, a jury trial having been duly waived by written stipulation filed with the clerk of the court, upon the stipulations and agreements as to facts, of which the following are copies:

32 United States Circuit Court, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

It is hereby stipulated and agreed as follows:

I. The facts admitted in the case of Alice W. Kelley against this defendant as printed, pages 11 to 19, inclusive, in the pleadings and proofs in said Kelley case, are also admitted in this case, and such admission is extended so as to apply to the year 1876, as well as to the years 1877 and 1878, and to the amounts assessed against and collected from the plaintiff and the shareholders named in schedules C, D, and E, annexed to the complaint herein.

The allegations in the complaint as to the plaintiff and his assignors not being inhabitants of the 6th ward (fols. 11, 31, and 50), and as to the assignments to plaintiff and the demand by him and the refusal by the county treasurer (fols. 12, 13, 32, 50, 51) are admitted.

II. The stipulation and affidavits contained on pages 19 and 20 of said Kelley case, the stipulation on page 23 thereof, and the affidavit on pages 23 to 25, inclusive, and the stipulation on page 24 of said Kelley case, are to be considered as if made in this case, and as applicable to the year 1876, as well as to the years 1877 and 1878.

III. It is admitted that the written notice or demand signed C. P. Williams, of which a copy is contained on pages 17 and 18 of said pleadings and proofs in said Kelley case, had annexed thereto a schedule the same as Schedule C annexed to the complaint, and that a like a written notice or demand for the taxes of each of the years 1877 and 1878 was also at the same time presented to said assessors, having annexed thereto schedules corresponding to Schedules D and E, respectively, annexed to the complaint herein.

IV. The aggregate assessments of real estate in said sixth ward during the years 1876, 1877, and 1878 were as follows: 1876, $7,082,762; 1877, $7,116,462; 1878, $7,045,145.

V. No other notices or demands than are set forth in paragraph XVIII of printed case, Kelley *v.* Board of Supervisors, and the like written notices or demands for the taxes of the years 1877 and 1878, above referred to, were ever served or made upon said assessors; and said assessors refused to cancel or reduce said assessments in compliance with said demands, and at the same time offered to receive evidence touching the indebtedness of any of the stockholders, as provided for in said act, and thereupon the plaintiff, as assignee of Lemon Thompson, Sylvester Hale, Maria Bender, and the estate of C. W. Bender, deceased, made proof that said persons and estate were indebted at the time of their assessments in an amount greater than the aggregate amount of their personal property, including bank stock, and thereupon the said assessors made their certificate pursuant to the provisions of said act, which was sent to the board of supervisors and to the county treasurer, and the said amount with interest thereon, as provided by said act, chapter 345, was raised by tax, and collected and paid by the county treasurer on or about the first day of February, 1884, to the plaintiff herein as such assignee. The amounts so allowed and paid are as follows:

Names of those assessed.	For what years.	Amount repaid, including interest.
Estate of C. W. Bender	1876	$198 14
Mrs. Maria Bender	1878	170 42
Sylvester Hale	1876	543 88
" "	1877	490 08
" "	1878	74 98
Lemon Thomson	1876	222 89
" "	1877	200 85
" "	1878	170 42
Total		$2,071 66

33 VI. This action was commenced by the service of a summons therein on the tenth day of March, 1883.

VII. The following-named persons assessed and named in one or more of said Schedules C, D, and E, died before the passage of said act, chapter 345 of 1883. William J. Blackall (died June, 1880), Martha P. Butler (died March 27, 1883), Nicholas Clapper (died December, 1877), Amelia A. Cobb (died March, 1881), Thomas Comstock (died February, 1877), Theodore F. Cornell (died December, 1880), Ann Darling (died July, 1879), Daniel H. Gardner (died December, 1, 1880), Sylvester Hale (died March, 1879), Peter Monteath (died June, 1880), John V. L. Pruyn (died November, 1877), James Roy (died July, 1878), James C. Visscher (died April, 1881), and Richard Van Rensselaer (died May, 1880), and that Harriet Hilton died June 28th, 1883, and Thomas E. Van Loon died July 16, 1883.

Dated April 24, 1884.

HALE & BULKLEY,
Plaintiff's Attorneys.
PECKHAM & ROSENDALE,
Defendant's Attorneys.

The following are the facts admitted in the case of Alice W. Kelley, referred to above:

Facts Admitted.

I. The citizenship of the plaintiff, the citizenship, and powers, and liabilities of the defendant, the organization and capital of the National Albany Exchange Bank, as alleged in the complaint.

II. The ownership by Chauncey P. Williams of shares of stock in said bank, as alleged in said complaint.

III. The assessment or attempted assessment by the board of assessors of the city of Albany, of said Williams, on said stock, in the years 1877 and 1878, and the collection from him under such assessment of the amounts mentioned in said complaint.

IV. The payment of said sums to the treasurer of the county of Albany, and the demand therefor by said Williams, and the neglect and refusal to pay by the county treasurer, and the residence of said Williams in the fourteenth ward of the city of Albany, as alleged in the complaint.

V. The assessment of the said Williams, and the other shareholders in said bank in 1877, was made in the following manner: In September, 1875, said Williams, as president of said bank, furnished said board of assessors a list of the stockholders of said bank, with their residences and the number of shares owned by each, written upon a sheet of legal cap paper. The assessors added opposite each name an amount equal to the par value of the stock owned by such persons, after deducting therefrom an amount which bore the same proportion to the par value as the assessed value of the real estate of the bank bore to the capital thereof, such addition being made in pencil. From this paper entries were made in the assessment-roll of 1875. The same paper was used in 1876, the assessors making in pencil such changes as were required by change of ownership. In 1877, further changes were made in pencil, as were required by changes in ownership.

The following is a copy of such paper after the changes made in 1877:

LIST OF STOCKHOLDERS.

National Albany Exchange Bank, September 4, 1877.

Names and residences.	No. shares.	Personal.
Mrs. Mary E. Allen, Chatham Village, N. Y.	25	$2,250
Wm. M. Bender, Albany	50	4,500
Estate of C. W. Bender, Albany	50	4,500
Estate of Gould Blakeman, Stratford, Conn.	10	900
Anson H. Blakeman, Stratford, Conn.	10	900
Mrs. Martha P. Butler, Brooklyn, N. Y.	10	900
Wm. J. Blackall, Albany	14	1,260
Phebe Comstock, Cambridge	20	1,800
Theo. F. Cornell, New Baltimore	25	2,250
Commerce Ins. Co., Albany	80	7,200
Mrs. Amelia A. Cobb, New York	50	4,500
Thomas B. Cole, Albany	13	1,170
Nicholas Clapper, West Sand Lake	11	990
34 Edward A. Durant, Albany	50	4,500
Estate of William Dickson, Albany	10	900
Mrs. Ann Darling, Albany	10	900
Mrs. Sarah Dey Ermand, Albany	5	450
Mrs. Ann De Witt, Albany	35	3,150
Gideon D. Eames, Albany	30	2,700
Milo R. Eames, Buffalo	20	1,800
Mrs. Hester S. Emerson, Albany	10	900
Miss A. G. Fairchild, Coxsackie	5	450
John T. Foote, Morristown, N. J.	10	900
William Gould, Albany	310	27,900
Mrs. Sarah M. Gould, Albany	2	180
William Gould, Jr., Albany	10	900
Estate of John Gould, Albany	8	720
Daniel H. Gardner, Hancock, Mass.	4	360
Sarah M. Gardner, Hancock, Mass.	2	180
Charlotte Gardner, Hancock, Mass.	1	90
Thomas H. Greer, Albany, N. Y.	25	250
Thomas H. Greer, executor, Albany	25	2,250
Sylvester Hale, Albany	122	10,980
Estate Ebenezer Hill, Norwalk, Conn.	70	6,300
Mrs. Harriet Hilton, Albany	10	900
Charles B. Lansing, Albany	25	2,250
Mrs. Sarah A. Lansing, Albany	15	1,350
Mrs. Mary L. G. Lewis, Hancock, Mass.	1	90
Caroline M. Lathrop, Madison, N. J.	10	900
Lansing Merchant, Albany	60	5,400
Estate James McNaughton, Albany	50	4,500
S. B. McCoy, Waterford	250	22,500
Peter McNaughton, Albany	50	4,500
William McElroy, Albany	100	9,000

Names and residences.	No. shares.	Personal.
James McElroy, Albany	5	$450
Henry T. Mosick, Albany	60	5,400
Peter Monteath, Albany	10	900
Estate of Amos Pilsbury, Albany	70	6,300
Mary Patrick, Troy	10	900
Spencer S. B. Peck, Albany	10	900
Henry C. Peck, Albany	10	900
Samuel C. Peck, Albany	10	900
Myron R. C. Peck, Albany	10	900
Alvah Pierce, Treasurer Baptist Education Society, Hamilton, N. Y.	5	not taxable
John V. L. Pruyn, Albany	145	13,050
Robert C. Pruyn, Albany	10	900
Agnes Pruyn, Albany	45	4,050
James Roy, West Troy	10	900
Elizabeth F. Spoor, Coxsackie	10	900
Adam Shields, Albany	3	270
William G. Thomas, Albany	100	9,000
Lemon Thomson, Albany	50	4,500
John L. Voorhees, Albany	10	900
Francis Vail, Amsterdam	15	1,350
Edward Visscher, Albany	12	1,080
Richard Van Rensselaer, Albany	1	90
" " executor, Albany	5	450
" " administrator, Albany	6	540
Mrs. N. Louisa Van Alstyne, Albany	40	3,600
Thomas E. Van Loon, Albany	10	900
Catherine Van Schaack, Kinderhook	10	900
James C. Visscher, executor, Albany	5	450
Chauncey P. Williams, Albany	455	40,950
George P. Wilson, Albany	15	1,350
Abram T. Wilson, Albany	20	1,800
Stephen H. Wendover, Stuyvesant	30	2,700
Estate of Abraham Wing, Glens Falls	20	1,800
Josiah B. Williams, Ithaca	50	4,500
Clement Warren, Albany	20	1,800
Alvah Pierce, Treasurer Baptist Education Society, exempt	--	450
Real estate, Schoharie and Albany	--	30,000
		$269,550
Exempt		450
Real estate, Schoharie and Albany		30,000
		$300,000

35 6TH SEPTEMBER, 1875.

I inclose above a list of stockholders, with the number of shares owned by each, with their residences.

Very truly yours,

C. P. WILLIAMS, *President.*

R. H. WEIR and others,
Assessors.

No entries of any assessment of said Williams, or of any of the stockholders of said bank, were made upon any assessment-roll in the year 1877 until after the first day of September, nor until after the time by law provided for reviewing assessments in said city had expired. Then the said paper was copied into the assessment-roll of the sixth ward of the city of Albany. The paper above set forth was open to examination and inspection during the time prescribed by law for the review and correction of assessments in the city of Albany, and was regarded by the board of assessors, and meant by the members thereof, as a valid and legal assessment, the same as if it had been physically included in the roll before September 1, in each year, and no alteration was made therein after the first day of September in each year respectively.

VI. The assessment of the said Williams and the other stockholders in said bank in the year 1878 was precisely the same as in the year 1877, except that a new list of such stockholders was made upon a similar sheet of paper by or under the direction of the assessors, which was entitled "List of Stockholders, National Albany Exchange Bank, July 1, 1878," and contained the names, residences, number of shares, and the par value of the shares, after making the deduction for real estate. This list was copied into the assessment-roll of the sixth ward after the expiration of the time prescribed by law for the review and correction of assessments in the city of Albany, and not before, but was accessible to persons the same as the actual roll itself, and was considered and regarded by the board of assessors, and meant by the members thereof, to be a valid and legal assessment of the shareholders in said bank, the same as if it had been physically included in the roll before September 1, in each year.

VII. No assessment was made against said Williams, or the other stockholders in said bank, upon their stock therein in 1877 or 1878, except as above stated.

VIII. No certificate or oath was attached to the said assessment-roll of the sixth ward, or to any assessment-roll of any ward of the city of Albany, during the years 1877 and 1878, except an oath made by the assessors, of which the following is a copy:

"We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the sixth ward of the city of Albany, according to our best information, and that, with the exception of those cases in which the value of such real estate has been changed by reason of proof produced before us, we have estimated the value of any such real estate at the sums which a majority of the assessors have decided to be a

fair relative value thereof; and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law, from taxation at the full and true value thereof, according to our best judgment and belief."

IX. During the years 1877 and 1878 the said board of assessors of the city of Albany assessed real estate in said city at not to exceed sixty per cent of its estimated actual value.

X. That there were during the years 1877 and 1878, in the sixth ward of the city of Albany, the following banks and banking associations:

The Mechanics and Farmers' Bank.
The Union National Bank.
The National Albany Exchange Bank.
The Merchants' National Bank.
The First National Bank.
The Albany City National Bank.
The New York State National Bank.
36 The Albany County Bank.
The National Commercial Bank.

XI. That all the above-named banks, with the exception of the Mechanics and Farmers' Bank and the Albany County Bank (which were State banks), were National banks, organized under the laws of the United States, and that there were no banks or banking associations during the years aforesaid in the city of Albany other than the nine banks above mentioned.

XII. That during the said years the assessors of the city of Albany assessed the shares of all the said banks and banking associations at their par value, deducting from such par value the assessed value of the real estate of each bank without reference to the actual value of said shares, excepting to ascertain that the actual value of all of said shares was more than the par value (excepting as to the shares of the Albany County Bank, a State, and not a National bank, the actual value of the shares of which was par). That the above-mentioned mode of assessment of bank stock was habitual and intentional on the part of said assessors, and had been uniformly practiced by them from the year 1872 down to and including the years 1877 and 1878.

XIII. That said mode of assessment was not consented to by the said Chauncey P. Williams, but was repeatedly objected to by him, and that in the years 1874 and 1875 legal proceedings were instituted by said Williams in the supreme court of the State of New York for the purpose of correcting such assessments, and in such proceedings the said Williams insisted on his own behalf, and on behalf of other stockholders in said bank, that it was the duty of the assessors to assess all property, including bank stock, at its true and actual value. That said assessors, at the time they made their assessments in 1877 and 1878, were aware of the fact that the shares of stock of said banks differed in value, and that the shares of the

Mechanics and Farmers' Bank and of several of the other banks were of much greater value than the shares of said National Albany Exchange Bank, and they were also aware of the fact that the shares of another National bank and of one State bank were of less value than the shares in said National Albany Exchange Bank.

XIV. That the shares of said banks differed in value, and the actual value of shares in said banks of the par value of $100 was, in the years 1877 and 1878, as follows:

Albany County Bank, $100 (a State bank).
Union National Bank, $110.
National Albany Exchange Bank, $125–$130.
Albany City National Bank, $160.
First National Bank, $160.
New York State National Bank, $170.
Merchants' National Bank, $210.
National Commercial Bank, $260.
Mechanics and Farmers' Bank, $285.

XV. That the total amount of the assessment of personal property in said sixth ward for the year 1877 was $2,785,950. That the assessed value of the shares of the

Mechanics and Farmers' Bank was	$280,000
Merchants' National was	160,000
First National	270,000
New York State National	315,000
National Commercial	270,000
Albany City National	270,000
Making	$1,565,000
National Albany Exchange Bank	$269,550
Union National Bank	225,000
Albany County Bank	190,000

and that the assessments of personal property and bank stock for the year 1878 did not differ materially from 1877.

XVI. Any laws of the State of New York may be referred to on any argument of this case as if formally put in evidence, also any judicial decisions bearing on the questions at issue.

XVII. The said assessors published a notice as required by the 2d section of chapter 345 of the Laws of 1883, and the plain-
37 tiff, during the time thus prescribed by said act, applied to said assessors for a cancellation of said assessments against said Williams, and joined with said Williams in a written notice or demand, of which the following is a copy:

To the assessors of the city of Albany:

You will take notice that I, Chauncey P. Williams, as assignee of the shareholders in the National Albany Exchange Bank named in Schedule C, hereto annexed, and representing said shareholders, and

also on my own behalf as such shareholder, hereby apply, under the provisions of section 3 of chapter 345 of the laws of 1883, to cancel the assessments made against said shareholders, and each of them, upon their respective shares of stock in said bank in the year 1876, and apply for such cancellation of such assessments upon the following grounds:

1. Said stockholders were not assessed upon their respective shares in the year 1876, within the time prescribed by law, but the names of said shareholders were added to the assessment roll of the sixth ward of the city of Albany in said year 1876, after the expiration of the time prescribed by law for making assessments of personal property, and the time for reviewing such assessments had expired. Said pretended assessments were therefore void, and upon the facts as they existed at the time when such assessments were placed on such roll the said shareholders were entitled to a cancellation of said assessment.

2. No such oath or certificate was made or affixed to said assessment roll as was required by law, and therefore said pretended assessments were void.

3. No valuation of said shares was ever made by said assessors, but the same were arbitrarily and without reference to their actual value assessed at their par value, less a proportionate share of the assessed value of the real estate of said bank, and said assessments were not justified by any law of the State of New York, and were in violation of the law of the United States.

4. The said shares were intentionally assessed at a greater rate than other moneyed capital in the hands of individual citizens of the State of New York, and such assessments were therefore in violation of section 5219 of the Revised Statutes of the United States, and were void.

5. In making assessments of real and personal property in said year the assessors did not attempt to comply with the law by assessing real property at its full value and at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor, but intentionally, and by an illegal plan of their own, assessed real property at not more than one-half of its estimated actual value, and thus unlawfully increased the burden of taxation imposed on the shares in question, and, consequently, were unable and failed to make the oath or certificate required by law.

And in case you shall refuse to cancel said assessments, as above requested, then, as such shareholder and as the assignee of the said other shareholders, and representing them, I apply to have a reduction of said assessments, so that the assessed value of such shares shall not be greater in proportion to the actual value thereof than the rate of assessment in said year imposed by you or your predecessors upon other moneyed capital in the hands of individual citizens of the State of New York in the city of Albany, and I claim that such reduction should be at least fifty-eight per cent. of the amount of each of said assessments.

You will further take notice that in making this application I do not admit the validity of said law (chapter 345 of the laws of 1883)

so far as it undertakes to legalize and confirm the assessments made against said shareholders upon their said shares of stock in said bank, but I insist and claim that the same is in violation of the Constitution and laws of the United States and of the constitution of the State of New York, and is wholly void and ineffectual for the purpose of legalizing and confirming said assessments. But for the purpose of obtaining back the moneys illegally collected from said shareholders in said year, I make this application on my own behalf and as assignee of said shareholders, and representing them, and hereby offer to make proof of the facts above stated.

Dated June 14, 1883. C. P. WILLIAMS.

And made proof of the matters hereinbefore stated as "Facts admitted," but said assessors refused to cancel said assessments pursuant to said demand.

38 XIX. That the assessments in question were made with no intent on the part of the assessors to discriminate against the holders of National bank shares, or in favor of those holding State bank shares, or other moneyed capital, and such assessments were, as matter of fact, satisfactory generally to the owners of State and National shares other then the shares of said National Albany Exchange Bank.

Dated December 10, 1883.

The above agreed to as correct.

HALE & BULKLEY,
Attorneys for Plaintiff.
PECKMAN & ROSENDALE,
Defendant's Attorneys.

The following are the stipulations and affidavits in the Kelley case, referred to in paragraph II of the forgoing stipulation:

It is hereby stipulated by and between the attorneys for the respective parties herein that the following affidavit may be read on the trial of the above-entitled action with the same force and effect as if the statements and facts therein set forth were orally testified to by said Weaver upon said trial.

Dated December 10, 1883.

HALE & BULKLEY,
Plaintiff's Attorneys.
PECKHAM & ROSENDALE,
Defendant's Attorneys.

William J. Weaver's Affidavit.

NORTHERN DISTRICT OF NEW YORK, *Albany City and County,* } *ss:*

United States Circuit Court, Northern District of New York.

ALICE W. KELLEY
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

William J. Weaver, being duly sworn, says that he was one of

the assessors of the city of Albany during the times mentioned in the complaint herein. That the assessors acting as such and who made the assessments referred to in said complaint acted in entire good faith in making the same and in all matters connected therewith, and without any intention to discriminate unfairly or unjustly against the shareholders in the National Albany Exchange Bank, or any of them.

WM. J. WEAVER.

Sworn to before me, this 7th day of December, 1883.

THOS. H. HAM,
Notary Public, Albany Co., N. Y.

United States Circuit Court, Northern District of New York.

ALICE W. KELLEY
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The following additional facts are hereby admitted in this case:

First. During the years 1877 and 1878 no deductions were allowed for indebtedness from assessments for bank stock by the board of assessors of the city of Albany, but in the years aforesaid no demand and affidavit, as required by statute to effect such reduction, was made by the plaintiff's assignor.

39 Second. The following are the amounts of the deductions for real estate assessments made from the assessments of the stockholders of the banks during the years aforesaid:

Mechanics and Farmers' Bank	$70,000
Merchants' National Bank	40,000
First National Bank	30,000
New York State National Bank	35,000
National Commercial Bank	30,000
Albany City National Bank	30,000
National Albany Exchange Bank	30,000
Union National Bank	25,000
Albany County Bank	10,000

Dated December 26, 1883.

PECKHAM & ROSENDALE,
Defendant's Attorneys.
HALE & BULKLEY,
Plaintiff's Attorneys.

CITY AND COUNTY OF ALBANY, *ss.:*

Chauncey P. Williams, being duly sworn, says: That he is the assignor of the plaintiff in the above-entitled action; that he called at the office of the board of assessors during the period in each year between 1874 and 1880, when the assessment-rolls were open for inspection, namely, at some time during the twenty days succeeding the first day of September in each year. That in said assessor's office there was in each year during said period, a long table, behind

which the assessors, or some one of them, generally sat or stood, upon which table were the assessment-rolls of the different wards of the city of Albany, each roll contained in a bound book laid out for the inspection of tax payers.

That the deponent called, during the years 1877 and 1878, between the 1st and 21st days of September in each of said years, to look at the assessments of the stockholders of the National Albany Exchange Bank, and of the other banks in the city of Albany, and on each of said occasions the assessors, or one of them, took a bundle of folded papers from a shelf or pigeon-hole behind said table, which bundle contained the paper upon which was the list of stockholders in said exchange bank (a copy of which, for the year 1877, is, as deponent believes, correctly set forth in the "facts admitted" herein as printed), and lists of stockholders in other banks in said city, and handed it to deponent; and deponent recollects no instance in said years in which any list of stockholders of said National Albany Exchange Bank was lying on said table with the assessment-rolls when so called for by deponent, and in no case when deponent had occassion to call for the purpose of such examination were said lists of stockholders of banks kept with or in any manner annexed to or accompanying the assessment-roll of the sixth ward of the city of Albany.

C. P. WILLIAMS.

Sworn to, this 24th day of December, 1883, before me.

GEORGE ADDINGTON,
Commissioner of Deeds, Albany, N. Y.

It is hereby stipulated by and between the attorneys for the respective parties herein, that the foregoing affidavit of C. P. Williams, and the following affidavit of W. J. Weaver, may be read on the trial of the above-entitled action with the same force and effect as if the statements and facts therein set forth were orally testified to by said Williams and Weaver respectively upon said trial.

December 26, 1883.

PECKHAM & ROSENDALE,
Defendant's Attorneys.

HALE & BULKLEY,
Plaintiff's Attorneys.

NORTHERN DISTRICT OF NEW YORK, } ss.:
Albany County, }

William J. Weaver, being duly sworn, says:

I was one of the assessors of the city of Albany during the times referred to in the affidavit of Mr. C. P. Williams (verified December 24, 1883); I have read said affidavit.

The assessors of the city of Albany regarded the bank shareholders' assessment in said affidavit and heretofore referred to, as part of the assessment in the sixth ward, and from the time when the assessment-roll was exhibited it was the rule of the office that the bank shareholders' assessment should be exhibited and be on the table with it, as such paper was regarded by the

assessors as a part of the said assessment-roll of the sixth ward. I do not remember a single instance in which such rule was departed from, and it was as much a matter of course to take down in the morning at the same time the rolls were taken from the safe such paper from the pigeon-hole in which it had been kept over night as it was to take the assessment-roll itself out of the safe at the beginning of the day.

I further depose and say that Mr. Williams is utterly mistaken when he says that such paper was not upon the table where the assessment-roll was exhibited, as it was there, or possibly upon a smaller table directly adjoining said large table where the roll was, such smaller table being, in fact, a sort of continuation or extension of the larger table.

WM. J. WEAVER.

Sworn to before me, December 25, 1883.

NATHANIEL NILES,
Commissioner of Deeds, Albany, N. Y.

It was admitted that the following act was enacted by the Legislature of the State of New York on the 30th day of April, 1883.

Chap. 345.

An act to legalize and confirm upon certain conditions the assessments contained in the assessment-rolls of the respective wards in the city of Albany, for the years 1876, 1877, and 1878.

Passed April 30, 1883; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The assessments contained in the assessment-rolls of the respective wards of the city of Albany, for the years 1876, 1877, and 1878, and which are now on file in the office of the receiver of taxes of the city, are hereby in all things legalized and confirmed, subject to the rights of the shareholders or their personal representatives in National or State banks which were located in said city during those years, and the assessments against whom, by reason of their ownership of such shares, were collected by process of law, to claim a deduction from or cancellation of such assessments as provided for in the next section.

§ 2. Within ten days after the passage of this act, the assessors of the city of Albany shall publish a notice subscribed by them, in the official papers of the city, daily, Sundays and holidays excepted, for three weeks, notifying all of such above-described shareholders that at the office of such assessors in the city of Albany for three weeks subsequent to the last day of the publication of such notice, Sundays and holidays excepted, the assessors will be in attendance, and will hear any application that may be made to them for the purpose of deducting from the assessments aforesaid any amount which such shareholder or his personal representative would have been entitled to deduct under the law as it existed in the year when the assessment was placed in the roll, had such application then been made.

§ 3. During the time above-named, any of such above-described shareholders assessed in any of such rolls, or any one representing them, may appear before such assessors and make application to have a reduction or cancellation of such assessment upon any ground which would have been a legal ground at the time when such assessment was placed in the roll, and upon the facts as they existed at the time when such assessment was placed in such roll. The assessors shall have power to administer an oath to the applicant, and, after an examination of him upon the material facts of such application, shall grant to him such deduction from or cancellation of the assessment in question, as he would have been legally entitled to upon the facts as they existed at the time when the assessment to reduce or cancel which the application is made was placed in the roll.

§ 4. After the expiration of the time for hearing applications, the assessors, or a majority of them, shall sign a certificate stating the name of the shareholder or his personal representative, who is entitled to a deduction from the amount contained in the assessment-roll, and the amount of such deduction, and the amount of the interest thereon from the 15th day of December of the year, to which the deduction applies up to the first day of February, 1884, and the certificate shall be made up in duplicate, and one of them sent to the board of supervisors of the county at its fall session in 1883, and the other to the county treasurer.

41 § 5. The board of supervisors shall at such session add to the amount to be raised by tax for county purposes the total amount named in such certificate for the principal and interest of such deduction therein named, and such sum shall be levied, assessed, and collected in the same way as other taxes for county purposes and paid to the county treasurer with other county funds.

§ 6. The county treasurer, upon receipt of the moneys raised by tax, shall pay to the parties named in such certificate sent him by the assessors the amount therein specified as due such persons.

§ 7. This act shall take effect immediately.

Upon these facts the court held and decided as follows:

Circuit Court of the United States, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

This action having been tried before me without a jury, a jury trial having been waived by the parties hereto, and the proofs and allegations of the parties having been heard, I find and decide as follows:

First. I find the facts admitted by the pleadings and by the stipulations of the parties herein.

Second. That the law, chapter 345 of the laws of 1883, a copy of

which is set forth on pages 33 and 84 of the printed papers herein, was duly enacted by the Legislature of the State of New York on the 30th day of April, 1883.

42 As conclusions of law I decide—

1. That the assessments and taxes mentioned in the complaint herein were illegal, because not imposed in conformity to the laws of the State of New York.

2. The said assessments and taxes were not in violation of any of the provisions of the laws of the United States.

3. That the said act, chapter 345 of the laws of the State of New York for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided, and was not in violation of any provision of the Constitution or laws of the United States.

4. That the defendant is entitled to judgment herein.

WM. J. WALLACE.

And the above-named plaintiff afterwards duly filed and served exceptions in writing to the said decision and finding, of which the following is a copy:

43 *Exceptions.*

Circuit Court of the United States, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

The above-named plaintiff hereby excepts to the decision of the circuit court herein, as filed, and specifies the following exceptions thereto:

I. Plaintiff excepts to the finding and decision that the assessments and taxes referred to in the complaint herein were not in violation of any of the provisions of the laws of the United States.

II. Plaintiff further excepts to the finding and decision, that the act, chapter 345 of the laws of the State of New York for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided.

III. Plaintiff also excepts to the finding and decision that the said act, chapter 345, was not in violation of any of the provisions of the Constitution or laws of the United States.

IV. Plaintiff also excepts to the decision that the defendant is entitled to judgment in this action.

V. Plaintiff excepts to said decision for that the court did
44 not find and decide that the assessments and taxes mentioned in the complaint were in violation of the provisions of § 5219 of the Revised Statutes of the United States.

VI. Plaintiff also excepts to said decision for that the court did not decide that the said act, chapter 345 of the laws of the State of

New York for the year 1883, was in violation of the Constitution of the United States, and especially of the 14th article or amendment thereof.

VII. Plaintiff also excepts to said decision for that the court did not decide that the said act, chapter 345, above mentioned, was void because it violated the provisions of said section 5219 of the Revised Statutes of the United States, by unlawfully assessing the shares of the plaintiff and his assignors in the National Albany Exchange Bank in a manner not permitted by the laws of the United States, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

Dated September 1st, 1884.

HALE & BULKLEY,
Plaintiff's Attorneys.
25 North Pearl St., Albany, N. Y.

45 And because the exceptions, admissions, and stipulations made and filed in this case do not appear of record, this bill of exceptions is made and settled by the judge who presided at the trial of this action, and ordered to be filed in the clerk's office of this court in and for the northern district of New York, and to be returned, with the record herein, with any writ of error that may be issued in this action.

Dated Sept. 30, 1884.

WM. J. WALLACE.

46 [Endorsed:] Circuit court of the U. S., northern district of N. Y. Chauncey P. Williams against The Board of Supervisors of the County of Albany. Bill of exceptions to decision of circuit court. Hale & Bulkley, att'ys for pl'ff, 25 North Pearl Street, Albany, N. Y. We consent to the signing and filing of within as the bill of exceptions. Oct. 1, 1884. Peckham & Rosendale, def't's att'ys. Hale & Bulkley, pl'ff's att'ys. Filed October 7, 1884. W. S. Doolittle, clerk.

47 United States Circuit Court, Northern District of New York.

CHAUNCEY P. WILLIAMS
agˈst
BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

WALLACE, J.:

This action is brought to recover certain taxes assessed against the plaintiff and several assignors of the plaintiff in the years 1877, 1878, and 1879, and collected by the defendant. The persons thus assessed were stockholders of the National Albany Exchange Bank of the city of Albany. The assessors omitted in those years to place the names of the shareholders upon the assessment-roll in accordance with the requirements of the State laws regulating assessments; and it was held by this court in Albany City National Bank *vs.* Maher, 6 Fed. Rep., 417, that such omission rendered the tax illegal because

the requirement which was disregarded by the assessors was designed to afford taxpayers an opportunity for the examination and revision of their assessments, and therefore should not be deemed directory merely, but essential, and a condition precedent to the validity of the tax.

It is insisted for the plaintiffs that the taxes thus collected were illegal, for the additional reason that the assessors violated the
48 rule of uniformity prescribed by § 5219 Revised Statutes U. S., which prohibits the taxation of shares in national banks at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

This contention rests upon the fact that the assessors habitually and intentionally adopted the practice in assessing individuals upon bank shares held by them in various banks of the city of Albany, of estimating the value of the shares at par, and assessing them at that valuation, less a deduction of the assessed value of the real estate of the bank, although, as a matter of fact, the value of such shares differed in different banks, so that while the shares in all the banks were really worth more than their par value, the shares in some of them were worth less than the shares in others. It does not appear affirmatively that this rule of valuation thus adopted operated to assess the shares of the stockholders here higher in proportion to their value than moneyed capital generally. It was applied alike to shares in State banks; and it is not shown how the capital of individual bankers was valued. The action of the assessors may have been a palpable violation of their duty under the laws of the State; and it has been so characterized in the opinions of the judges of the State courts when the validity of the assessments have been questioned; but it does not follow that it was an unfair discrimination against shareholders of national banks, and therefore in contravention of the Federal law. The question, however, is not an open one in this court, it having been decided adversely to the plaintiff upon
49 the same state of facts in Stanley *vs.* Board of Supervisors, 15 Fed. Rep., 483.

The disposition which must be made of this question is fatal to the plaintiff's case, because the case does not turn upon the point of the illegality of the original assessments. That point has already been decided in favor of the plaintiff. The case turns upon the efficacy of the curative act passed by the Legislature of the State to validate the assessments in controversy. (Chapter 345, Laws of 1883). Undoubtedly the Legislature could not validate a tax which was prohibited by the laws of the United States, but it was competent for them to sanction retroactively such proceedings in the assessment of the tax as they could have legitimately sanctioned in advance.

The act of 1883 is the second legislative attempt to validate the taxes in dispute. The prior act (chap. 271, laws of 1881) was adjudged by this court, in Albany City National Bank *vs.* Maher, 9 Fed. Rep., 884, unconstitutional, because it was, in effect, a legislative assessment of a tax upon a body of individuals without apportionment or equality as between them and the general body of tax

payers. The fatal vice of the act was the denial of an opportunity to those assessed to be heard and permitted to obtain the deductions and corrections allowed by the general system of assessments.

The present act is carefully framed to obviate the objections which were fatal to the former act. It legalizes and confirms the assessments contained in the assessment-rolls for the several wards of the city of Albany for the years 1876, 1877, and 1878, and on file
50 in the office of the receiver of taxes, subject to the right of the parties interested to claim any deduction from or cancellation of the assessments to which they would have been entitled under the laws existing when the respective assessments were made; and it provides for a reasonable notice and a reasonable opportunity for the parties to be heard, and to obtain such deductions or remission of the tax as may be just. It also provides for restitution to all the parties of any sum improperly included in the tax, with interest from the time the tax carried interest.

The only objection to the validating act which seems to deserve consideration is found in the circumstance that the tax payers have not been given an opportunity to be heard until after they were compelled to pay their taxes. The general rule has often been declared that the legislature may validate retrospectively any proceedings which they might have authorized in advance. And it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation. If, therefore, it was within the competency of the legislature to provide for the collection of a tax by a system which requires the tax payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing and to obtain restitution if restitution ought to be made the validating act was constitutional.

51 Under the power of taxation the property of the citizen is appropriated for the public use to the extent to which he should contribute to the public revenues, and he is liable to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute. He cannot be deprived of his property even under the power of eminent domain without due process of law, or in other words, without notice and an opportunity to be heard; and this is an essential requisite of every lawful proceeding which affects rights of property or of person. In judicial proceedings due process of law requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated to the public use under the power of eminent domain, or under the power of taxation, different considerations from those which prevail in controversies between individuals obtain. Thus when property is taken under the power of eminent domain by the State, or by municipal corporations by State authority, the adjudications sanction the validity of laws which permit the property of the citizen to be appropriated before a hearing, and before compensation. It is sufficient if provision is made by the law by which the party can obtain compensation, and for a

hearing before an impartial tribunal to award the compensation. And it is assumed by the decisions in these cases that the property of the municipality is a fund to which he can resort without risk of loss. Cooley Cons. Lim., 560, 561. There seems to be no
52 reason for a different rule when the money of the tax payer is appropriated by the sovereign power under the right of taxation. The reason why a right to be heard by the tax payer respecting the imposition of a tax is valuable and essential for his protection, is in order that he shall not be obliged to bear a disproportionate part of the public burden. If the taxing laws secure him in this right as effectually as is deemed sufficient in laws authorizing his property to be taken under the power of eminent domain, it would seem upon analogy and upon principle that he is protected sufficiently, and that the taxing laws would not contravene the constitutional prohibition.

Undoubtedly it is beyond the power of the Legislature to validate the acts of taxing officers of a character which cannot be justified as an exercise of the taxing power, as where a part of the property in a taxing district should be assessed at one rate and a part at another; or if persons or property should be assessed for taxation in a district which did not include them. And it is stated in general, by a text writer of high authority, that a validating act cannot cure the illegality of an assessment made without any notice to the persons interested. (Cooley on Taxation, 227, 228.) The case of Marsh *vs.* Chestnut, 14 Ill., 223, and Billings *vs.* Delton, 15 do., 288, are referred to as sustaining the proposition. Those were cases where the curative act was held bad for the same reason that the curative act of 1881 was held to be nugatory by this court, because it did not pro-
vide for an assessment upon notice to the tax payer, and thus
53 perpetuated the vice of the original assessment. The present act, as has been said, is framed to obviate this objection. No adjudged case has been cited by counsel, or has met the attention of the court, where such an act has been considered. It is asserted in many cases that notice and an opportunity for a hearing of some description are matters of constitutional right; but it has nowhere been declared that it is indispensable that the hearing should be one in advance of the collection of the tax. The operation of the present act is to preserve substantially to the tax payers the right of which they were originally deprived; to give them an opportunity to question the justice of the assessment, and to restore to them the sums which were illegally collected of them. In view of the large and almost unlimited discretion which resides in the Legislature to regulate the mode and conditions of taxation, it is believed to be valid and effectual to legalize the proceedings here.

Judgment is ordered for the defendant.

(Indorsed:) Opinion, Wallace, J. Original filed the 22d day of July, 1884. W. S. Doolittle, clerk.

54 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the judges of the circuit court court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in rendition of the judgment of a plea which is in the said circuit court of the United States in and for the northern district of New York, before you, between Chauncey P. Williams, plaintiff, and the Board of Supervisors of the County of Albany, defendants, manifest error hath intervened to the great damage of the said Chauncey P. Williams, as by his complaint appears.

Now, therefore, we being willing that full and complete justice be done the said Chauncey P. Williams, and that the error, if any hath been committed, should be duly corrected, do command you, if judgment be therein given, that you send the record thereof and proceedings aforesaid, distinctly and openly under your seal, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that we may have the same at Washington, on the second Monday of October, 1884, in the said Supreme Court to be then and there held, that the record and
55 proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 30th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

Allowed by—

WM. J. WALLACE.

[Endorsed:] U. S. Supreme Court. Chauncey P. Williams, plaintiff in error, *against* The Board of Supervisors of the County of Albany, defendants in error. 2823. Writ of error. Matthew Hale, att'y for pl'ff in error, 25 North Pearl street, Albany, N. Y.

56 United States Circuit Court, Northern District of New York.

CHAUNCEY P. WILLIAMS
against
THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

Know all men by these presents, that we, Chauncey P. Williams and Jonas H. Brooks, are held and firmly bound unto The Board of Supervisors of the County of Albany in the full and just sum of five hundred dollars, to be paid to the said The Board of Supervisors of the County of Albany, its certain successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this second day of October, A. D. 1884.

Whereas lately at a stated term of the said circuit court of the United States for the northern district of New York, in a suit depending in said court between Chauncey P. Williams, plaintiff, and The Board of Supervisors of the County of Albany, defendant, judgment was rendered against the said Chauncey P. Williams, and the said Chauncey P. Williams being about to prosecute a writ of
57 error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation being about to issue directed to the said The Board of Supervisors of the County of Albany, citing and admonishing the said board to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1884:

Now, the condition of the above obligation is such, that if the said Chauncey P. Williams shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

C. P. WILLIAMS.
J. H. BROOKS.

Sworn and delivered in presence of—
THEO. T. WILCOX.

UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

Chauncey P. Williams and Jonas H. Brooks being duly sworn, each for himself deposes and says that he is a resident and freeholder within the said northern district of New York, and is worth the sum of one thousand dollars, over and above all just debts and liabilities which he owes or has incurred, and besides property exempt by law from execution.

58 Severally sworn to before me, this 2nd day of October, 1884.
[SEAL.] THEODORE T. WILCOX,
Notary Public, Albany Co.

I approve of the above bond and the sureties therein.
WM. J. WALLACE.

[Indorsed:] Bond upon appeal to U. S. Supr. Ct. Filed October 7, 1884.

59 United States of America to the Board of Supervisors of Supervisors of the County of Albany, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Chauncey P. Williams is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 30th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

WM. J. WALLACE.

60 [Endorsed:] U. S. Supreme Court. Chauncey P. Williams, plaintiff in error *agst.* The Board of Supervisors of the County of Albany, defendants in error. 2523. Citation. Matthew Hale, att'y for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due service of a copy of the within citation is admitted. Oct. 4., 1884. Peckham & Rosendale, att'ys for def't in error.

61 *Assignment of Errors.*

Supreme Court of the United States.

CHAUNCEY P. WILLIAMS, Plaintiff in Error,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, Defendant in Error.

Assignment of errors of October term, in the year of our Lord one thousand eight hundred and eighty-four.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Chauncey P. Williams, by Matthew Hale, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. The court erred in finding and deciding that the assessments and taxes referred to in the complaint in said action were not in violation of any of the provisions of the laws of the United States.

II. The court erred in that it omitted to find that the said
62 assessments and taxes so referred to were in violation of the provisions of § 5219, of the Revised Statutes of the United States, because the shares of the banking association referred to in the said complaint were not included in the valuation of the personal property of the holders and owners of such shares in assessing taxes imposed by authority of the State of New York, and were assessed separate and apart from the other personal property of the owners thereof.

III. The court erred in omitting to find and decide that the assessments of said shares was in violation of the provisions of said section 5219 of the Revised Statutes of the United States, because such assessment and tax was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

IV. The court erred in finding and deciding that the act, chapter 345, of the laws of the State of New York, for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided.

V. The court erred in omitting to find and decide that the
63 said chapter 345 of the laws of the State of New York for the year 1883 was in violation of the Constitution, and especially of the provision in article fourteen of said Constitution, that no State shall deprive any person of property without due process of law.

VI. The court erred in omitting to find and decide that the said act, chapter 345, was also in violation of the provision of article fourteen of the Constitution of the United States, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

VII. The court erred in omitting to find and decide that the said act, chapter 345, above mentioned, was void, because it violated the provisions of § 5219 of the Revised Statutes of the United States, by unlawfully assessing shares of plaintiff and his assignors in the National Albany Exchange Bank in a manner not permitted by the laws of the United States, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

There is also error in this, to wit, that by the record aforesaid
64 it appears that the judgment aforesaid was given for the said defendant, the Board of Supervisors of the County of Albany, against the said plaintiff, Chauncey P. Williams, whereas, by the law of the land, said judgment ought to have been given for the said plaintiff against the said defendant; and the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment, &c.

MATTHEW HALE,
Attorney for Pl'ff in Error,
Albany, N. Y.

65 [Endorsed:] Supreme Court of the United States. Chauncey P. Williams, plaintiff in error, *vs.* The Board of Supervisors of the County of Albany, defendant in error. Assignment of errors. Matthew Hale, att'y for pl'ff in error; 25 North Pearl street, Albany, N. Y. Filed Oct. 7th, 1884. W. S. Doolittle, clerk.

66 UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 65, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Chauncey P. Williams against The Board of Supervisors of the County of Albany, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this 8th day of October, in the year

of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[SEAL.] WILLIAM S. DOOLITTLE, *Clerk.*

[Endorsed:] Transcript of record. Supreme Court of the United States. No. ——. Chauncey P. Williams, plaintiff in error, *vs.* The Board of Supervisors of the County of Albany. In error to the circuit court of the United States for the northern district of New York. Filed ——.

[Endorsed on cover:] N. New York, C. C. U. S. No. 1084. Chauncey P. Williams, plaintiff in error, *vs.* The Board of Supervisors of the County of Albany. Filed 15th October, 1884.

122-136

CLERK'S OFFICE SUPREME COURT U. S.
FILED
MAR 4 1887
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 387

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR.

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

BRIEF OF PLAINTIFF IN ERROR.

MATTHEW HALE,
Attorney and of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 387

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR.

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

BRIEF OF PLAINTIFF IN ERROR.

MATTHEW HALE,
Attorney and of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

CHAUNCEY P. WILLIAMS,
Plaintiff in Error.

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

BRIEF OF PLAINTIFF IN ERROR.

In error to the Circuit Court of the United States for the Northern District of New York.

STATEMENT.

This action was originally brought in the Supreme Court of the State of New York, on the 10th day of March, 1883. (Fol. 33.) It was brought to recover back certain taxes alleged to have been illegally assessed against and collected from the plaintiff and other shareholders of the National Albany Exchange Bank, upon their shares of stock in said bank, in the years 1877, 1878 and 1879, for the taxes of 1876, 1877 and 1878.

The complaint contains three counts. The plaintiff sues in his own right and as assignee of other shareholders of said bank. The grounds upon which the assessments in question were claimed to be illegal will appear from the following statement, contained in each count of the complaint, with the substitution of the year 1877 in the second, and 1878 in the third count, in place of 1876:

And plaintiff says, upon information and belief, that the said pretended assessment was illegal and void. That under the Constitution and laws of the United States, said shares of stock were not liable to assessment and taxation by State authority, except so far as permission to make such assessment was given by section 5219 of the Revised Statutes of the United States, which provides that nothing therein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but that the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking asso-

ciations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere.

And plaintiff further says, upon information and belief, that the said shares were not included in the valuation of the personal property of the owner or holder of such shares in legally assessing taxes imposed by the authority of the State of New York; that no assessment was made against the said plaintiff, or said other persons, estates, or corporations upon their said shares of stock within the time required by law; that under the laws of the State of New York relating to the assessment and collection of taxes in the city of Albany, it was the duty of the board of assessors to complete the assessment-rolls of the several wards of said city on or before the first day of September in each year, and that said assessors had no authority or jurisdiction to make any assessment in any year after the first day of September; that no assessment was made against the said shareholders upon their said shares of stock until after the 1st day of September, 1876; and that the names of the said shareholders did not appear upon the said pretended assessment-roll of said Sixth ward until after the 1st day of September, 1876, and after the pretended assessment of the taxable inhabitants of said Sixth ward upon real and personal property, other than bank stock, in said ward, had been fully completed; that after said pretended assessment-roll had been so completed, and the time by law provided for reviewing said assessment-rolls and hearing the application of persons conceiving themselves aggrieved thereby, and for the correction and alteration thereof, had expired, a list of the said shareholders, with the number of shares owned by each of them, and the par value thereof (deducting the requisite sum for the assessed value of the real estate of said bank), was added at the end of said pretended assessment-roll, and was returned with it to the supervisor of said Sixth ward as part of said pretended assessment-roll.

That the board of assessors of said city was required by the law of the State of New York, relating to said city of Albany, in assessing the real estate in said ward for purposes of taxation, to assess it at its full value, and also to assess the taxable personal property of each inhabitant of said city, after deducting his debts and his property invested in the stock of any corporation liable to be taxed for such stock, at its full value, and the said assessors were by law required to make an oath or certificate, which should be written on each assessment-roll, to the effect that, with the exception of those cases in which the value of the said real estate had been changed by reason of proof produced before them, they had estimated the value of the real estate situated in the said ward

at the sums which a majority of the assessors had decided to be the full and true value thereof, and at which they would appraise the same, in payment of a just debt, due from a solvent debtor, and also that the assessment-roll contained a true statement of the aggregate amount of the taxable personal estate of each and every person named in the said roll, over and above the amount of debts due from such person, respectively, and excluding such stocks as were otherwise taxable, and such other property as was exempt by law from taxation, at the full and true value thereof, according to their best judgment and belief. That under the laws of the State of New York no assessment of real or personal property was valid, unless such certificate or oath was made by the assessors and written on such assessment-roll. That the said board of assessors, in the year 1876, failed to make such oath or certificate, and that no oath or certificate, such as was required by law, was written upon or attached to said pretended assessment-roll, but instead thereof an oath, which failed in form or in substance to comply with the law, and was not in accord with the said requirements thereof, was written thereon or attached thereto.

That the said assessors did not, in fact, do their duty, as required by law, and did not assess real estate in said ward at its full value, but did assess it at a sum not to exceed from forty to sixty per cent of what, in their judgment, was such full and true value, and failed to assess taxable personal property at its full and true value; and that the failure to make the oath or certificate required by statute was intentional on the part of said assessors, and was due to the fact that said assessors knew they had not done their duty as required by statute, and, therefore, could not make the oath as by statute required; and that by reason of the facts above set forth, there was no valid assessment of any real or personal property in said city of Albany in the year 1876, and plaintiff is advised and believes that the said pretended assessments against the estate of Gould Blakeman, the estate of William Dickson, the estate of John Gould, the estate of Ebenezer Hill, the estate of James McNaughton, the estate of John T. Wendover and the estate of Abraham Wing, were also, each of them, entirely, unauthorized, illegal and void, because no assessment was made or attempted to be made against any person or corporation of the value of the shares belonging to the said respective estates.

And plaintiff further says, upon information and belief, that the said assessors did intentionally, by a rule prescribed by themselves, assess or assume to assess the said shares of stock in said National Albany Exchange Bank, higher in proportion to their actual value, than other moneyed capital in the hands of individual citizens of the State of New York. That the rule adopted by said assessors was to assess all shares of stock in State and National banks in said city at par, irrespective of their actual

value, making the requisite deduction for real estate owned by said banks. That such rule necessarily resulted in imposing upon the shares of said National Albany Exchange Bank a higher rate of taxation than was assessed upon other moneyed capital. That there were, in said Sixth ward of said city, at the time of said assessment, several banks, State and National, and that the actual value of the stock of said banks varied, that of the shares of stock in the said National Albany Exchange Bank being considerably less than the value of the stock of most of the other banks in said city. That by reason of said rule, acted upon by said assessors, as aforesaid, and also by reason of the fact that no legal or valid tax was assessed upon other moneyed capital in said city, the said pretended assessment was in violation of the restriction contained in section 5219, of the Revised Statutes of the United States. That said pretended assessment of said shares was at a greater rate than the average rate imposed, or attempted to be imposed, upon other moneyed capital in said ward or city in the year 1876; and that for all the reasons above mentioned the said pretended assessment was illegal and void, and the money thereby collected was wrongfully collected and paid into the county treasury, and belonged of right to the said plaintiff and said other persons, corporations and estates, and not to said county.

After the commencement of the action, on the 30th of April, 1883, the Legislature of the State of New York passed an act purporting to legalize and confirm the assessments contained in the assessment-rolls of the respective wards of the city of Albany, for the years 1876, 1877 and 1878, a copy of which may be found on pages 37 and 38 of the record.

The answer of defendant (page 18), contains a denial of the allegations of the complaint, and, for a second defense, sets up the above mentioned law of 1883. For a third defense, it alleges that the plaintiff, by receiving certain moneys, which were paid under the said act, had ratified and acknowledged its validity.

Issue having been thus joined, the action was duly removed, on the petition of the plaintiff, into the Circuit Court of the United States, on the ground that it was a case arising under the Constitution and laws of the United States. (See petition, bond and order of removal, and order entering the cause in the United States Circuit Court, pp. 19–22.)

The parties waived a jury trial, and consented to a trial of the issues before Judge Wallace, without a jury, upon the facts admitted, together with the pleadings and other printed papers in the action. (P. 22.)

The case was tried, pursuant to this stipulation, in December, 1883. The decision (page 23), was filed August 25, 1884. By it the court found the facts admitted by the pleadings and by the stipulations of the parties; also found that the assessments and taxes mentioned in the complaint, were illegal, because not imposed in conformity with the laws of the State of New York; but that they were not in violation of any provision of the laws of the United States; and found that the confirmatory act was valid and effectual to legalize the assessments, and was not in violation of any provision of the Constitution or any of the laws of the United States, and that the defendant was entitled to judgment. To these rulings, exceptions were duly taken.

The case is brought here by writ of error to review the judgment entered on this decision.

ASSIGNMENT OF ERRORS.

I. The court erred in finding and deciding that the assessments and taxes referred to in the complaint in said action were not in violation of any of the provisions of the laws of the United States.

II. The court erred, in that it omitted to find that the said assessments and taxes so referred to were in violation of the provisions of section 5219, of the Revised Statues of the United States, because the shares of the banking association referred to in the said complaint were not included in the valuation of the personal property of the holders and owners of such shares in assessing taxes imposed by authority of the State of New York, and were assessed separate and apart from the other personal property of the owners thereof.

III. The court erred in omitting to find and decide that the assessments of said shares were in violation of the provisions of said section 5219 of the Revised Statutes of the United States, because such assessment and tax was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

IV. The court erred in finding and deciding that the act, chapter 345 of the Laws of the State of New York, for the year 1883, was valid and effectual to legalize and confirm said assessments as therein provided.

V. The court erred in omitting to find and decide that the said chapter 345 of the Laws of the State of New York, for the year 1883, so far as it purported to legalize the assessments in question, was in violation of the Constitution of the United States, and especially of the provision in article 14 of said Constitution, that no State shall deprive any person of property without due process of law.

VI. The court erred in omitting to find and decide that the said act, chapter 345, so far as it attempted to legalize said assessments, was also in violation of the provision of article 14 of the Constitution of the United States, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

VII. The court erred in omitting to find and decide that the said act, chapter 345, above mentioned, in so far as it purported to legalize said assessments, was void, because it violated the provisions of section 5219 of the Revised Statutes of the United States, by unlawfully assessing shares of plaintiff and his assignors in the National Albany Exchange Bank, in a manner not permitted by the laws of the United States, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York.

POINTS OF PLAINTIFF IN ERROR.

FIRST. THE ASSESSMENTS REFERRED TO IN THE COMPLAINT WERE ILLEGAL AND VOID.

This was conceded and held by the court below; but, with a view to consider the effect of the confirmatory law, it is deemed necessary here to discuss the grounds of such illegality.

1. *By reason of the omission of the assessors to place the names of the shareholders upon the assessment-roll before September first in each year.*

The facts, in regard to these assessments, bearing upon this point, as agreed upon by the parties, are as follows:

V. The assessment of the said Williams, and the other shareholders in said bank, in 1877, was made in the following manner: In September, 1875, said Williams, as president of said bank, furnished said board of assessors a list of the stockholders of said bank, with their residences and the number of share owned by each, written upon a sheet of legal cap paper. The assessors added opposite each name an amount equal to the par value of the stock owned by such person, after deducting therefrom an amount which bore the same proportion to the par value as the assessed value of the real estate of the bank bore to the capital thereof, such addition being made in pencil. From this paper entries were made in the assessment-roll of 1875. The same paper was used in 1876, the assessors making in pencil such changes as were requried by change of ownership. In 1877, further changes were made in pencil, as were required by changes in ownership.

The following is a copy of such paper, after the changes made in 1877:

LIST OF STOCKHOLDERS.

NATIONAL ALBANY EXCHANGE BANK, SEPTEMBER 4, 1877.

Names and residences.	No. shares.	Personal.
Mrs. Mary E. Allen, Chatham Village, N. Y.....	25	$2,500
Wm. M. Bender, Albany.....	50	4,500

Etc., giving the names of all the stockholders, the number of shares owned by each and the "personal" against each, as set forth in pages 28 and 29 of the record. Footing up, $269,550; exempt, $450; real estate, Schoharie and Albany, $30,000; total, $300,000.

September 6, 1875.

I inclose above a list of stockholders, with the number of shares owned by each, with their residences.

Very truly yours,

C. P. WILLIAMS,

R. H. WEIR AND OTHERS, *President.*

Assessors.

No entries of any assessment of said Williams, or of any of the stockholders of said bank, were made upon any assessment-roll in the year 1877 until after the first day of September, nor until after the time by law provided for reviewing assessments in said city had expired. Then the said paper was copied into the assessment-roll of the Sixth ward of the city of Albany. The paper above set forth was open to examination and inspection during the time prescribed by law for the review and correction of assessments in the city of Albany, and was regarded by the board of assessors, and meant by the members thereof, as a valid and legal assessment, the same as if it had been physically included in the roll before September first, in each year, and no alteration was made therein after the first day of September in each year respectively.

VI. The assessment of the said Williams and the other stockholders in said bank, in the year 1878, was precisely the same as in the year 1877, except that a new list of such stockholders was made upon a similar sheet of paper, by or under the direction of the assessors, which was entitled "List of Stockholders, National Albany Exchange Bank, July 1, 1878," and contained the names, residences, number of shares, and the par value of the shares, after making the deduction for real estate. This list was copied into the assessment-roll of the Sixth ward after the expiration of the time prescribed by law for the review and correction of assessments in the city of Albany, and not before, but was accessible to persons the same as the actual roll itself, and was considered and regarded by the board of assessors, and meant by the members thereof to be a valid and legal assessment of the shareholders in

said bank, the same as if it had been physically included in the roll before September first, in each year.

VII. No assessment was made against said Williams, or the other stockholders in said bank, upon their stock therein in 1877 or 1878, except as above stated.

NOTE.—The above admissions were originally made in the case brought by Alice W. Kelley against the defendants, but are incorporated in this case by the following stipulation:

It is hereby stipulated and agreed as follows:

I. The facts admitted in the case of Alice W. Kelley, against this defendant as printed, pages 11 to 19 inclusive, in the pleadings and proofs in said Kelley case, are also admitted in this case, and such admission is extended so as to apply to the year 1876, as well as to the years 1877 and 1878, and to the amounts assessed against and collected from the plaintiff, and the shareholders named in schedules C, D and E annexed to the complaint herein.

See Record, p. 25, fol. 32.

It appears from Mr. Weaver's affidavit, that while the assessment-roll was kept at night in a safe, the paper containing the list of stockholders was kept in a different place and that one was not attached to the other. (P. 37.)

The law relating to assessments in the city of Albany, in force at the time of these assessments, was as follows:

§ 5. Between the third Tuesday of April and the first day of September in every year, the board of assessors of the city of Albany shall ascertain, by dilligent inquiry, the names of all taxable inhabitants in the several wards of the said city, and also all the taxable property, real or personal, within the same.

§ 6. They shall prepare an assessment-roll for each of the wards in the said city, in which they shall set down, in separate columns, and according to the best information in their power:

1. In the first column the names of all the said taxable inhabitants of the ward, and also the names of all other persons having real estate belonging to them in the ward.

2. In the second column, and opposite the name of each such inhabitant or person, a brief and proper description, with the dimensions and boundaries of the real estate in the ward, belonging to such inhabitant or person. * * *

3. In the third column, and opposite the description of each parcel of real estate, the full value of such real estate.

4. In the fourth column, and opposite the name of each inhabitant of the ward, the full value of all the taxable personal property owned by such inhabitant, after deducting the just debts owing by him, and his property invested in any corporation or association liable to be taxed for such stock as capital or otherwise.

Chapter 86 of the Laws of New York for 1850, §§ 5 and 6.

It will be readily seen that the course of the assessors was entirely unwarranted by the statute. The only way provided by law for making assessments in the city of Albany is by inserting them in the assessment-roll. The fact that the paper was regarded by the assessors as a valid and legal assessment, as above stated, makes no difference. The law required the assessment to be made in a certain way, and it has been repeatedly held that an assessment made otherwise, or after the statutory time, is absolutely void.

Clark v. Norton, 49 N. Y., 243.
Westfall v. Preston, Id. 349.

This question was before Judge Wallace in a suit brought by another of the Albany banks, and, upon precisely the same state of facts, he held the assessment to be void. In that case the learned Judge says:

"I am, therefore, constrained to hold that the assessment against the shareholders of the plaintiff was not merely invalid for an irregularity, but void because the assessors failed to preserve the conditions precedent to their right to assess."

Albany City Nat. Bank v. Maher, 6 Fed. Rep., 417, 423.

In the same case it is shown that, by reason of the omission to put the assessment on the roll, the shareholders were deprived of an opportunity to be heard. The opinion says:

"Where, as was the case here, the formal roll which is presented for the inspection of the taxpayers contains no evidence of an assessment against an individual, he has a right to assume that there is no assessment against him. Neither legal duty nor common sense requires him to institute further inquiries. He has a right to assume that the assessors have complied with the laws, and that their roll is the complete exhibit of their official action. He is not to suppose that a separate list unknown to the law has been regarded by the assessors as constructively a part of the roll, which, in fact, is not a constituent part of it. Practically, as well as theoretically, to permit such a list to be regarded as the assessment-roll would be dangerous, and liable to mislead the taxpayers and deprive them of the opportunity to obtain a revision of their assessments. (P. 423.)

2. *By reason of the failure of the assessors to annex the statutory oath or certificate to the assessment-roll.*

The facts upon this point as agreed upon, are as follows:

VIII. No certificate or oath was attached to the said assessment-roll of the Sixth ward, or to any assessment-roll of any ward of the city of Albany, during the years 1877 and 1878, except an oath made by the assessors, of which the following is a copy:

"We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the Sixth ward of the city of Albany, according to our best information, and that, with the exception of those cases in which the value of such real estate has been changed by reason of proof produced before us, we have estimated the value of any such real estate, at the sums which a majority of the assessors *have decided to be a fair relative value thereof;* and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt, by law, from taxation at the full and true value thereof, according to our best judgment and belief."

The oath required by law to be made and attached to the assessment-roll is as follows:

We, the undersigned, do severally depose and swear that we have set down, in the foregoing assessment-roll, all real estate situate in the (town or ward, as the case may be) according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors *have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor;* and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full and true value thereof, according to our best judgment and belief, which oath shall be written on said roll, signed by the assessors, and certified by the justice, and shall be in place of the official certificate now required by law; and every assessor who shall wilfully swear false in taking and subscribing said oath, shall be deemed guilty of, and liable to the penalties, of willful and corrupt perjury. (Chapter 176 of the Laws of New York, for 1851, § 8.)

It will be seen that the departure by the assessors from the statutory oath was very material. The law required them to swear that they had assessed the real estate in the ward, at the full and true value thereof, and at which they would appraise the

same in payment of a just debt due from a solvent debtor. Instead of taking this oath, the assessors swear that they have estimated the value of the real estate at the sums which a majority of them "have decided to be be the *fair relative value* thereof;" a phrase without any exact meaning, but intended to cover a violation of the statute. The following is another of the agreed facts in the case:

IX. During the years 1877 and 1878, the said board of assessors of the city of Albany assessed real estate in said city, at not to exceed sixty per cent of its estimated actual value. (Record, p. 31, applied to this case, and to the year 1876, by par. I, Record, p. 25.)

It is perfectly well-settled law in the State of New York that such a departure from the statutory oath makes the assessment absolutely void.

In Van Rensselaer v. Whitbeck (7 N. Y. [3 Seld.], 517), the certificate was "that we have estimated the value of the said real estate at the sums which a majority of the assessors have decided *to be proper;* and that the assessment-roll contains a true statement of the aggregate amount of the taxable personal estate, etc., according to the usual way of assessing." The Court of Appeals held the assessment to be absolutely void, and that the defective certificate being a part of the process, and the defect, therefore, appearing upon the face of the process, it was no protection to the supervisor who issued, or the collector who collected the warrant, and they were held to be liable in trespass to the plaintiff. This case arose in the year 1847, at a time when a certificate, instead of an oath, was required of the assessors.

In Hinckley v. Cooper (22 Hun, 253), decided in September, 1880, the oath taken was: "We have estimated the value of said real estate at the sums which a majority of the assessors have decided to be *the assessed value thereof;* and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate, etc., *at the value thereof, according to our best knowledge and belief.*" The Supreme Court of the State of New York held the assessment to be void, and ordered judgment against the defendant who was the supervisor of the town. In this case Learned, P. J., says:

"The affidavit of the assessors is defective in a material point, and the defect was doubtless intentional. To say that they had estimated the value of the real estate at the sums which they

had decided to be the assessed value thereof, is a plain evasion of the statute, and means little or nothing. To omit the clause 'and at which they would appraise,' etc., leaves out a very important part of the statutory affidavit; and the remaining omission and alteration carry out the violation of the statute."

* * * * * *

The case of *Van Rensselaer* v. *Whitbeck* (7 N. Y., 517) applies directly to the present case. The defects are very similar, and were doubtless made with the same object in both cases. That case is recognized as sound in *Westfall* v. *Preston*, *ut supra*. It cannot be necessary to discuss a question thus settled and settled wisely.

Judgment must be rendered on the submission for the amount claimed by the plaintiff with costs."

22 Hun, 256, 257.

The case of *Brevoort* v. *The City of Brooklyn* (89 N. Y., 128) arose under a special law relating to that city, by which an oath was required by the assessors, substantially the same as that required in the State at large, with the addition that the assessors "have, together, personally examined, within the year past, each and every lot and parcel of land, house, building or other assessable property within the ward." The assessors omitted this part of the oath. The court held that this omission in the oath was a substantial defect which invalidated the tax and sale made under it; and that the plaintiff who had purchased at the sale could recover back the moneys paid, from the city.

Although the defect in the oath in this case related to real estate it affected the assessment and taxation of the bank shares. It appears that, in fact, real estate was assessed at only sixty per cent of its actual value, and the oath was doubtless changed to satisfy the consciences of the assessors in regard to this mode of assessment. Of course, the assessment of the real estate at less than its actual value increased the burden upon the bank stock and other personal property. The defect, therefore, was not a technical one; but substantially injured the plaintiff and the other shareholders of the bank.

3. *Because the assessments in question were at a greater rate than was imposed upon other moneyed capital in the hands of individual citizens, and were, therefore, a violation of section* 5219 *of the Revised Statutes.*

The facts appearing upon this point are contained in paragraphs

X, XI, XII, XIII, XIV, and XV, of the agreed facts. (Pages 31 and 32 of record.)

The assessors insisted on assessing the shares of all banks and banking associations at par (making requisite deductions for real estate). This mode of assessment was habitual and intentional on the part of the Assessors, and had been uniformly practiced by them from 1872, down to and including 1877 and 1878. (Facts admitted, par. XII, p. 31.)

It was not agreed to by plaintiff or his assignors, and had been repeatedly objected to by him, and he had instituted legal proceedings in behalf of himself and his fellow stockholders to correct such assessments, and had insisted that it was the duty of the Assessors to assess all property, including bank stock, at its true and actual value. (Par. XIII, p. 31.)

The Assessors were aware of the fact that the shares of the stock in the different banks varied, and that that of several of the other banks were of much greater value than those of the Exchange Bank. (Id.)

The actual value of the shares of the different banks is stated in paragraph XIV; the total amount of assessment of personal property and of the bank stock in paragraph XV.

From these admitted facts the following table is submitted:

	Assessed value.	Actual value.	Percentage of assessed to actual value.
Mechanics and Farmers' Bank	$280,000	$937,500	.35
Merchants' National Bank	160,000	380,000	.42
National Commercial Bank	270,000	750,000	.36
New York State National Bank	315,000	567,000	.55
Albany City National Bank	270,000	450,000	.60
First National Bank	270,000	450,000	.60
National Albany Exchange Bank	269,550	344,550	.78
Union National Bank	225,000	250,000	.90
Albany County Bank	190,000	190,000	1.00

Taking this bank stock, State and National, as a standard, and we find that $3,534,500 in value of money capital, consisting of other bank stock, was assessed at a *less* rate than the Exchange Bank, while only $450,000 in value was assessed at a greater rate. Adding to the $450,000 the total amount of personal assessments in the Sixth ward other than bank stock ($536,400), and assuming that such other personal property was assessed at its full value, still the fact remains that the vast majority of personal property including moneyed capital in the Sixth ward was, in the years in question,

assessed at a less rate than the stock of the Exchange Bank. This resulted, not from accident, or from an erroneous judgment on the part of the assessors as to the actual value, but from the rule which the assessors, in spite of the remonstrances of the plaintiff and others, persisted in. In other words, it resulted from the illegal system adopted by the assessors, and not simply from an erroneous judgment.

This court held, in the Stanley case, that if "the assesors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the National banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery."

105 U. S., 318.

It has been repeatedly held that without permission of Congress, the State authorities could not impose any tax whatever on shares of National banks.

See People v. Weaver, 100 U. S. 513, and cases there cited.

The permission of Congress is contained in section 5219 of the Revised Statutes, which permits the shares in any association to be included in the valuation of the personal property of the owner or holder of such shares * * * subject to the restriction that the taxation shall not be at a greater rate than is assessed on other moneyed capital, etc.

It will be observed that this section speaks of "*any*" association that is, each association is to be considered by itself; and the State authorities had no right to tax the stock of the National Albany Exchange Bank at any greater rate than was assessed upon "other moneyed capital," whether such other moneyed capital consisted of money invested in bonds and mortgages or in the stock of other banks, State or National. We have a right, therefore, to see whether the system adopted by the assessors necessarily resulted in taxing the stock in this particular bank at a greater rate than other moneyed capital invested in other national banks as well as State banks. For it cannot be claimed that if all the moneyed capital in a particular ward or town consisted of money invested in the stock of various National banks, that the State has authority to assess the stock of one National bank at a greater rate than it taxes the stock of other National banks.

It is admitted in this case that the assessors assessed the shares of all the banks at their par value, without reference to actual value, except to ascertain that the actual value was at least par. That this mode of assessment was habitual and intentional, and had been uniformly practiced by the assessors from the year 1872 down to and including the years 1877 and 1878. (Par. XII, p. 31.)

Referring to the case of The People, *ex rel.* Williams, v. The Board of Assessors, 2 Hun, 583 (under the stipulation in par. XVII) it will be found that the assessors were informed by the Supreme Court of the State of New York, in November, 1874, that their "basis of assessment was in manifest disregard of the plain directions of the statute;" "that it was utterly indefensible" (p. 585); that it "was a palpable violation of the laws of this State" (p. 587); that "it was the duty of the defendants to have assessed the shares of stock in all the banks at their true value, instead of their par value, and that all the assessments are unauthorized and erroneous where the actual value of the stock is above par." (P. 588).

Notwithstanding these admonitions of the Supreme Court, which were afterward repeated by the Court of Appeals in Williams v. Weaver, 75 N. Y. 30, at page 33, the assessors persisted in this erroneous and illegal course.

The remarks of the New York Supreme Court above cited were based upon the State statutes, but they would have been evidently just as appropriate if the Federal statute had been under consideration. It is plain, therefore, again referring to the language of this court in the Stanley case, that the assessors, in defiance of law, habitually and intentionally, and by a "rule prescribed by themselves," assessed the shares of the National bank higher in proportion to their actual value than other moneyed capital generally in the Sixth ward. (105 U. S. 318.)

4. *Because said assessments were in violation of section* 5219, *of the Revised Statutes, in that the shares of the bank were not included in the valuation of the property of the holders and owners of such shares, but were assessed separate and apart from the other personal property of the owners.*

(*a.*) The allegations in the complaint, as to the plaintiff and his assignors not being inhabitants of the Sixth ward, were admitted. (Par. I, p. 25). The allegations in this respect were that neither the plaintiff, nor any of the persons or corporations named in the schedules annexed to the complaint, were, at the time of the assessment, taxable inhabitants of the Sixth ward, although most of them were taxable inhabitants of the city of Albany, except two persons and one corporation, named in each count. (As to first count see page 2, at bottom; as to second count see page 7, at top; as to third count, page 10.) This mode of assessment was not a compliance with section 5219.

(*b.*) The language of section 5219 implies a *valuation*. In this case there was no valuation. The assessments were made *without reference to the actual value* of the shares, except to ascertain that they were all worth par or more than par. (Par. XII, *supra.*) This adoption of an arbitrary sum, entirely irrespective of *actual value*, was in violation of section 5219.

5. *The assessments against estates, eo nomine, were illegal, without jurisdiction, and void.* (See allegations of complaint in first count, at top of page 5; in second count, on page 8, fol. 6; in third count, on page 12). *This has been settled by the Court of Appeals of New York.*

Trowbridge v. Horan, 78 N. Y., 439.

In the case last cited, Chief Judge Church says:

The words "estate of A. B." is not and cannot be an owner in any sense whatever. The title to real property is always vested in some person or corporation either absolutely or in trust; and the statute requires the assessment to be made to the owner, and it is irregular and unauthorized to make an assessment to an estate. * * * The statute defines how assessment-rolls are to be made. In the first column the names of all the taxable inhabitants are to be put down; in the second, the quantity, and in the third the value of the land. This requirement must be substantially complied with. They constitute a part of the proceedings which may deprive a citizen of his property, and a compliance with them is essential to the validity of the assessment. (Pages 442, 443.)

This doctrine is equally applicable to personal property. Referring to the law relating to the assessment of taxes in the

city of Albany, above cited, it will be seen that in the assessment-roll are to be placed, in the first column, the names of the taxable inhabitants of the ward; in the fourth column, and opposite the name of each inhabitant of the ward, the full value of all the taxable personal property. An "estate" is not an "inhabitant" as is shown by Chief Judge Church in the above case. It is not the name of any person or corporation.

SECOND. THE COURT ERRED IN DECIDING THAT THE ACT, CHAPTER 345 OF 1883, WAS VALID AND EFFECTUAL TO LEGALIZE AND CONFIRM SAID ASSESSMENTS.

1. *This act, so far as it legalizes assessments should be held to apply only to such assessments as had not been collected.*

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.

Cooley's Const. Lim., 370.
U. S. v. Heth, 3 Cranch, 399.
Harvey v. Tyler, 2 Wall., 328.
Dash v. Van Kleek, 7 Johns., 477.
Drake v. Gilmore, 52 N. Y., 389, 394.
Quackenbush v. Danks, 1 Denio, 128; S. C., 3 id., 594.
Bay v. Gage, 36 Barb., 447, 451.

2. The above principle was applied by the Supreme Court of Connecticut to a statute very much like that relied upon here.

In that case the statute undertook to legalize "all taxes which had been theretofore laid and imposed according to such assessment lists," and it was held that such act, while it might make good taxes which had not been levied and collected, could not be extended by construction so as to affect a suit previously brought, and then pending, against the selectmen of the town, for the taking of property under a warrant from them to satisfy a tax laid on such defective assessment list.

Thames Manuf. Co. v. Lathrop, 7 Conn., 550.

3. The language of the Connecticut statute, construed in the case last cited, was quite as strong as that of the act of 1883. It legalized all taxes which had been theretofore laid and imposed according to the defective assessment lists. Still it was held to have no application to cases where the taxes had been collected.

IV. The validating portion of the law is very brief. It consists of the first four lines of section 1, which are as follows:

The assessments contained in the assessment-rolls of the respective wards of the city of Albany for the years 1876, 1877 and 1878, and which are now on file in the office of the receiver of taxes of the city, are hereby in all things legalized and confirmed."

See record, p. 37.

Effect can be given to this part of section 1 by considering it as applicable only to such assessments as, at the time of the passage of the act, remained uncollected.

ATTEMPTED LEGALIZATION AS TO COLLECTED TAXES UNCONSTITUTIONAL.

V. If, however, the act should be considered as attempting to legalize the assessments in question upon which taxes have been collected, *it is in violation of the constitution of the United States, and is void as depriving plaintiff and the other shareholders of their property without due process of law, and also denying to them the equal protection of the laws.*

(*a.*) All the authorities which sustain the power of the Legislature to legalize a defective proceeding, recognize the limitation that it cannot disturb vested rights.

Thus in *Tifft* v. *City of Buffalo*, 82 N. Y., 204, Judge Folger says:

"It is not meant to assert that the Legislature may, by a retrospective statute validate municipal action that trenches upon vested rights, or affects substantial equities." (P. 210).

"A retrospective statute affecting and changing vested rights is very generally considered, in this country, as founded on unconstitutional principles, and, consequently, inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair

contracts, or *disturb absolute vested rights*, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations."

1 Kent's Com., 455.

Thus it was held by the Supreme Court of Pennsylvania:

"That an act of the Legislature cannot take the property of one man and give it to another, and that where it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the Legislature to infuse life into that which is dead, to give effect to a mere nullity."

Richards v. Rote, 68 Penn., 248, 256.
See, also, Menges v. Dentler, 33 Penn. St., 493; Shaffer v. Eneu, 54 id., 304.

Again, the same court say that retrospective laws are supported only

"Where they impair no contract or *disturb no vested right*, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted."

Shonk v. Brown, 61 Penn. St., 320, 327.

The Supreme Court of Illinois has passed directly upon this question:

"The failure of an assessor to make his return within the time designated by law vitiates the assessment. Such defects cannot be cured by subsequent Legislation where the taxes have been collected, or where further proceedings were not necessary to secure their collection."

Bilings v. Detten, 15 Ill., 218.

To same effect,

Marsh v. Chestnut, 14 id., 223.

Again, the same court says:

"The Legislature, by retrospective enactment, is powerless to divest an individual of a vested right, but may require that acts shall be performed in the future, and declare that their omission shall subject an individual to the forfeiture of such a right. Where the officers conducting a tax sale omit essential acts rendering it invalid, the Legislature is powerless to cure the defect, and render the sale valid. When a right has become vested, the Legislature has no power to impose penalties or terms as a condition to the assertion of the right."

Conway v. Cable, 37 Ill., 82.

So in the State of Maine v. Doherty (60 Me., 504), a statute, purporting to confirm and make valid the doings of a court in relation to certain indictments, such court having had no jurisdiction, was held to be void as in contravention of the United States Constitution, article 14, section 1, as well as of the Constitution of the State. In this case the expressions "due process of law," and "law of the land," are discussed and construed. The court say:

"That clause in the act of 1872, which undertakes to confirm and make legal and valid the doings of the Superior Court in criminal cases, which had been in accordance with the provisions of that act when that court had no criminal jurisdiction, is unconstitutional and void. It assumes retroactively to invest with the authority, force and effect of law proceedings * * * which, up to the time of its enactment, were illegal and void, and which, but for it, would have remained so to this day. It is clearly within the class of subjects inhibited by the National and State Constitutions as topics of legislation, and is included in the provision against passing any law to deprive any person of life, liberty or property, without due process of law."

So in the case of Forster v. Forster (129 Mass., 559), it was held by the Supreme Court of Massachusetts, Gray, C. J., that the act passed by the Legislature of that State in the following words was unconstitutional and void:

No sale heretofore made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words "or such undivided portions thereof as may be necessary," or the words "or such undivided portions of the same as may be necessary:" provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the eighth day of February of the current year and before the passage of this act. (Stat. of 1878, chap. 229.)

The court says: "The statute assumes to take away private property without due process of law, and without compensation." The court proceeds to state and classify with great clearness the cases in which retrospective statutes have been sustained, and one of the six clauses of such cases is stated as follows:

5. Cases of statutes confirming informal or irregular assessments of taxes *so that they might be collected in the future, but not undertaking to give force to illegal seizures* or sales of property already made.

(*b.*) Applying these principles to the facts in this case it will be seen that chapter 345 of the Laws of 1883 must be held void so far as it purports to legalize assessments, the taxes on which have been collected.

The money so unlawfully taken from plaintiff and the other shareholders, when paid into the county treasury, belonged of right to the plaintiff and the other shareholders, as is alleged in the complaint at the end of each count. (See pages 5, 9 and 12.) The other shareholders, assigned to the plaintiff the moneys in the county treasury belonging to them, and he sued for such moneys as well as (in the first count) for moneys collected from himself. This suit was brought before the passage of the act of 1883. The original illegality of the assessment, and, consequently, the unlawfulness of the taking by the marshal are conceded. It follows that, upon the 9th day of April, 1883, the moneys thus unlawfully collected belonged to Mr. Williams. Could the Legislature by an act passed on the 10th day of April, 1883, transfer the title to these moneys from Mr. Williams to the county of Albany? Would not this be depriving him of his property without "due process of, law"?

It is entirely different from a legalizing act passed before the collection of a tax and taking away certain technical defenses. In such a case the tax could be collected, after the passage of the law from the parties liable therefor.

But we have not been able to find any case where it has been held that it was within the power of the Legislature, after moneys had been unlawfully collected, to transfer the title to such moneys from one person to another. The cases which are relied upon by the defendant's counsel are all cases in which the legalizing act applied to *uncollected* taxes, or cases of *reassessment*, which depend upon a principle entirely different.

In this case the Legislature of 1883, recognizing the fact that the only effective remedy of the county was by reassessment, passed chapter 341 of the Laws of 1883, which provided for the reassessment upon the original shareholders of these identical taxes, and the collection of taxes thereon in case of final recovery in this case.

See Session Laws of 1883, chap. 341.

THIRD. THE DEFECTS IN THE ASSESSMENTS INVOLVED IN THIS ACTION WERE SUCH AS COULD NOT BE LEGALIZED, EVEN IF THE TAX HAD NOT BEEN COLLECTED.

1. The State authorities could not impose any tax whatever on the shares of national banking associations without permission of Congress, or in any other way than permitted by the laws of the United States.

See People v. Weaver, 100 U. S. 543, and cases there cited.

2. That permission is given by section 5219 of the Revised Statutes, which is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The taxes are to be "included in the valuation of the personal property" of the owner or holder of the shares. The defect on account of which the court below has held the assessments invalid is one that violates this provision. The pretended assessment was not by inclusion of the value of the shares with the other personal property of the shareholder; it was a separate and independent assessment, not a part of any assessment-roll. It was, in fact, nothing but a list of the names of the shareholders, with the par value of the shares owned by them, respectively, after deducting therefrom a certain amount for the assessed value of the real estate of the bank. (See, facts admitted, V, pp. 27, 30.)

The assessors, therefore, acquired no jurisdiction to make this pretended assessment.

3. The defect in the oath, involving, as it did, an unlawful assessment of real estate, at a less rate than the law required, affected a substantial equity, which cannot be legalized by a subsequent statute.

See Tifft v. Buffalo, *supra*.

Real estate was assessed at not to exceed sixty per cent of its estimated actual value. (Facts admitted, IX, p. 31.) The amount of the assessments of real estate in the Sixth ward, during each of the years in question, was over $7,000,000. (See par. IV, p. 26.) The actual value of this real estate was nearly $12,000,000. The shares of the National Albany Exchange Bank were assessed at seventy eight per cent of their actual value. (Par. XIV.)

It will readily be seen therefore that the illegality of the assessments of real estate, evidenced by the defective oath, and the fact that such real estate was not assessed at its full and true value as required by statute, substantially increased the burden attempted to be imposed on the plaintiff and the other shareholders of the National Exchange Bank.

4. There was no apportionment, or attempted apportionment of the tax in question. The original assessment was at a fixed and arbitrary sum irrespective of actual value, except that the value was not less than par. (See Facts admitted, XII, p. 31.) This mode of assessment was repeatedly objected to by the plaintiff. The assessors were aware that the shares of the stocks of the different banks differed in value, and that some were much greater than others. (See par. XIII, and XIV, pp. 31, 32.) There was, therefore, no apportionment, but an arbitrary imposition of a fixed sum without reference to actual value.

"Taxation without an assessment must be incapable of confirmation because apportionment is indispensable."

Cooley on Taxation, p. 227, and cases cited in note 3.

FOURTH. THE NOTICE AND HEARING PROVIDED FOR BY CHAPTER 345 WERE NOT SUFFICIENT TO CONSTITUTE DUE PROCESS OF LAW.

The sections in question were as follows:

§ 2. Within ten days after the passage of this act the assessors of the city of Albany shall publish a notice subscribed by them, in the official papers of the city, daily, Sundays and holidays excepted, for three weeks, notifying all of such above described shareholders, that, at the office of such assessors in the city of Albany, for three weeks subsequent to the last day of the publication of such notice, Sundays and holidays excepted, the assessors will be in attendance, and will hear any application that may be made to them for the purpose of deducting from the assessments aforesaid any amount which such shareholder or his personal representative would have been entitled to deduct under the law as it existed in the year when the assessment was placed in the roll, had such application then been made.

§ 3. During the time above named, any of such above described shareholders, assessed in any of such rolls, or any one representing them, may appear before such assessors and make application to have a reduction or cancellation of such assessment upon any ground which would have been a legal ground at the time when such assessment was placed in the roll, and upon the facts as they existed at the time when such assessment was placed in such roll. The assessors shall have power to administer an oath to the applicant, and after an examination of him upon the material facts of such application, shall grant to him such deduction from or cancellation of the assessment in question as he would have been legally entitled to upon the facts as they existed at the time when the assessment, to reduce or cancel which the application is made, was placed in the roll.

These provisions were held by the learned Circuit Judge to be sufficient to meet the constitutional objection raised to the act. (See his opinion on pp. 42 and 43 of the record.)

1. The law passed by the Legislature of the State of New York to legalize the tax of 1880, (chapter 271 of the Laws of 1881), was held by the same learned judge to be void as depriving the persons named in the bill of their property without due process of law.

Albany City National Bank v. Maher, 9 Fed. Rep., 884.

2. The act in question here is liable to the same objections as that of 1881. It undertook to validate a void assessment, which is beyond the legislative power. The so-called assessment made by

the assessors was beyond their jurisdiction, being made after the time that the law permitted them to make assessments.

Westfall v. Preston, 49 N. Y., 349.
Clark v. Norton, 49 N. Y., 243.

It lacked all the elements of a valid tax. There was no apportionment, but an arbitrary assessment of a fixed sum without reference to actual value. It could not, therefore, be legalized.

Cooley on Taxation, 227.
Cooley on Const. Lim., 115.
Denny v. Mattoon, 2 Allen, 861.
Mayor, etc., v. Horn, 26 Md., 194.
Butler v. Saginaw, 26 Mich., 25.
Tifft v. Buffalo, 82 N. Y., 204, 210, 211.

3. This act does not profess to be a reassessment. It attempts to legalize the old assessment, and it gives an opportunity for the shareholders, or their personal representatives, to appear and make application for a reduction, or cancellation, etc. In other words, it legalizes the assessment made six or seven years before the passage of the act, without any notice, and provides that those who were then assessed, if living, or their representatives if they are dead, may, after this lapse of time, come and make proof which will entitle them to a cancellation or reduction of the old assessment. This is by no means equivalent to an assessment with proper notice.

"Due process of law" means, when applied to taxation, that the person assessed "should have an opportunity to be heard *before the charge is fully established against him.*" (Cooley on Taxation, 265, 266; Stuart v. Palmer, 74 N. Y. 183).

Could it be held that a law authorizing judgment and execution against a citizen, without giving him an opportunity to be heard, was constitutional, because it provided that he might move to vacate, and if successful, ultimately compel restitution? (See Cooley on Const. Lim. 356 [4th ed. 441]; id. 369 [4th ed., 459] and note. See also the late case of County of Santa Clara v. Southern Pac. R. Co., 18 Fed. Rep., 385).

4. Again, many of the plaintiff's assignors were dead at the time of the passage of the act, as appears in the record (Par. VII). Many of the assessments were to "estates," and were wholly illegal. No personal notice to those shareholders is provided for by the act; but they, whether dead or alive, have the privilege of appearing before the assessors to make application for reduction or cancellation from an assessment made from five to seven years before, within a certain time after publication of notice. This inadequate and entirely ineffectual provision for getting back what had wrongfully been taken from them years before does not supply the "opportunity to be heard before the charge is fully established against him," which is necessary in order to constitute "due process of law."

5. No mode is provided in the act for reviewing the action of the assessors by appeal or otherwise. Their construction of the act (chap. 345), was, therefore, a judicial construction, and their decision was that of the highest judicial tribunal of the State, and is conclusive to this court as to the construction and meaning of the law.

People v. Weaver, 100 U. S., 539, 542.
Leffingwell v. Warren, 2 Black, 599, 603

The assessors published the notice provided for by the second section. Thereupon the plaintiff, acting as assignee of the other shareholders in the bank and for himself, made a written application or demand to the assessors of which the following is a copy:

To the Assessors of the City of Albany:

You will take notice that I, Chauncey P. Williams, as assignee of the shareholders in the National Albany Exchange Bank named in Schedule C, hereto annexed, and representing said shareholders, and also on my own behalf as such shareholder, hereby apply under the provisions of section 3 of chapter 345 of the Laws of 1883, to cancel the assessments made against said shareholders, and each of them, upon their respective shares of stock in said bank in the year 1876, and apply for such cancellation of such assessments upon the following grounds:

1. Said stockholders were not assessed upon their respective shares in the year 1876, within the time prescribed by law, but the

names of said shareholders were added to the assessment-roll of the Sixth ward of the city of Albany in said year 1876 after the expiration of the time prescribed by law for making assessments of personal property; and the time for reviewing such assessments had expired. Such pretended assessments were, therefore, void, and upon the facts as they existed at the time when such assessments were placed on such roll, the said shareholders were entitled to a cancellation of said assessment.

2. No such oath or certificate was made or affixed to said assessment-roll as was required by law, and, therefore, said pretended assessments were void.

3. No valuation of said shares was ever made by said assessors, but the same were arbitrarily, and without reference to their actual value, assessed at their par value, less a proportionate share of the assessed value of the real estate of said bank, and said assessments were not justified by any law of the State of New York, and were in violation of the law of the United States.

4. The said shares were intentionally assessed at a greater rate than other moneyed capital in the hands of individual citizens of the State of New York, and such assessments were, therefore, in violation of section 5219 of the Revised Statutes of the United States, and were void.

5. In making assessments of real and personal property in said year, the assessors did not attempt to comply with the law, by assessing real property at its full value, and at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor, but intentionally, and by an illegal plan of their own, assessed real property at not more than one-half of its estimated actual value, and thus unlawfully increased the burden of taxation imposed on the shares in question, and, consequently, were unable and failed to make the oath or certificate required by law.

And in case you shall refuse to cancel said assessments as above requested, then, as such shareholder, and as the assignee of the said other shareholders, and representing them, I apply to have a reduction of said assessments, so that the assessed value of such shares shall not be greater in proportion to the actual value thereof than the rate of assessment in said year imposed by you or your predecessors upon other moneyed capital in the hands of individual citizens of the State of New York in the city of Albany, and I claim that such reduction should be at least fifty-eight per cent of the amount of each of said assessments.

You will further take notice that in making this application I do not admit the validity of said law (chap. 345 of the Laws of 1883), so far as it undertakes to legalize and confirm the assessments made against said shareholders upon their said shares of stock in said bank, but I insist and claim that the same is in violation of the Constitution and laws of the United States, and of the Constitution of the State of New York, and is wholly void and ineffectual for

the purpose of legalizing and confirming said assessments. But for the purpose of obtaining back the moneys illegally collected from said shareholders in said year, I make this application on my own behalf, and as assignee of said shareholders, and representing them, and hereby offer to make proof of the facts above stated.

C. P. WILLIAMS.

Dated, *June* 14, 1883.

See record, par. 17, pp. 32-34.

Similar written notices and demands were served for the taxes of each of the years 1877 and 1878. (Par. III, p. 26.) The assessors refused to cancel or reduce said assessments in compliance with said demands, and at the same time offered to receive evidence touching the indebtedness of any of the stockholders as provided for in said act. (Par. V., p. 26.) The assessors held, therefore, in substance that, under the provisions of the act in question, and the facts stated and proved before them, which were same as the "facts admitted," here (see statement at end of par. XVIII, on p. 34), they had no jurisdiction to cancel the assessments or to reduce the same so that the assessed value of the shares should not be greater in proportion to the actual value than the rate of assessment in those years imposed upon other moneyed capital; but that their only jurisdiction was to make deductions for indebtedness when proved.

See par. V. p. 26.

Thus considered, the act of 1883 gave no remedy whatever to the shareholders for the gross irregularity and excessiveness of the original assessment, except so far as it permitted a restitution to those who were entitled to a reduction by reason of indebtedness.

5. *The adjudications in regard to property taken under the power of eminent domain, do not sustain the court below in its holding that the hearing provided for by chapter* 345 *of* 1883, *was sufficient.* (See opinion pp. 42 and 43; fols. 51 and 52.)

(*a.*) The Federal courts have generally held that, in such cases, compensation must be paid before the property can be taken.

See Bonaparte v. Camden R. Co., 1 Bald., 205.
Avery v. Fox, 1 Abb. (U. S.), 246.
Pryzbylowicz v. Miss. R. R. Co., 17 Fed. Rep., 292.

And that the owner should have notice of the proceeding, and an opportunity to be heard before his property is taken.

Burns v. Multnomah R. Co., 15 Fed. Rep., 177.

(*b.*) In New York this doctrine has been so far modified as to permit the State to appropriate the property before making compensation, provided the law under which it is taken makes *certain and ample* provision for payment. In the language of Chief Justice Nelson:

"Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before the property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that at least certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals, or otherwise, without any unreasonable or unnecessary delay. *Otherwise the law making the appropriation is no better than blank paper.*

People v. Hayden, 6 Hill, 361.

And laws providing for the taking of private property for public uses which do not contain a "*sure, sufficient and convenient remedy* by which the owner can subsequently coerce payment by legal proceedings," have been repeatedly held unconstitutional and void.

Sage v. City of Brooklyn, 89 N. Y., 189, 195, and cases there cited.

(*c.*) And the New York courts have also held that the property owner is entitled to be heard as to whether the use to which the property is to be taken is a public use, or, in case of a railroad, is necessary for its use.

R. & S. R. R. Co. v. Davis, 43 N. Y., 137.
In re N. Y. Central R. R. Co., 66 N. Y., 407.
In re E. B. W. & M. Co., 96 N. Y., 42.

(*d.*) Laws authorizing the exercise of eminent domain, without providing for compensation, have been repeatedly held to be unconstitutional and void.

Mills on Eminent Domain, sec. 128.
Thatcher v. Dartmouth Bridge Co., 18 Pick., 501.
In re Mount Washington Road, 35 N. H., 134.
Boston & L. R. R. Co. v. Salem & L. R. R. Co. 2 Gray 1.

Watson v. Trustees, 21 Ohio St., 667.
Beckwith v. Beckwith, 22 Ohio St., 180.
Nichols v. Somerset R. R. Co., 43 Me., 356.
State v. Reid, 35 N. H., 59.
Pritchard v. Atkinson, 3 N. H., 335.

And a law by which the commissioners were empowered to issue bonds, payable at such times as they might designate, not exceeding two years, was held to be unconstitutional and void on the ground that the owner was entitled to *immediate* payment or *immediate provision* for payment.

39 N. J. L., 665.

(*e.*) Where property was taken in the assumed exercise of the right of eminent domain, but without authority, although taken for public use, it was held that an act of the Legislature authorizing the appointment of commissioners to appraise the damages already sustained, and making their award, and the payment or the tender of the sum awarded a bar to any action by the owners to recover such damages, was unconstitutional and void.

In re Peter Townsend, 39 N. Y., 171.

In this case Woodruff, J., speaking for the majority of the Court, says:

If the respondent saw fit to commit the wrong, instead of waiting for legislative authority to construct their reservoir, they became liable for damages, from the payment of which they could not be relieved by any retroactive legislation, and for the ascertainment of which the appellant could not be compelled to submit to the appraisal of a tribunal not proceeding according to the course of the common law. (P. 180.)

(*f.*) It is confidently believed that no decision can be found to the effect that a wrongful taking of personal property under an illegal and void assessment for taxation can be validated by a law passed several years afterwards, which gives to the owners of the property or their representatives an opportunity to be heard before the officials who did the wrong, as to whether they shall have restitution.

FIFTH. THE ATTEMPTED LEGALIZATION BY CHAPTER 345 OF 1883 WAS VOID, BECAUSE IN VIOLATION OF THE RESTRICTION IN SECTION 5219 OF THE REVISED STATUTES, THAT THE TAXATION SHALL NOT BE AT A GREATER RATE THAN IS ASSESSED UPON OTHER MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS OF THE STATE.

The invalidity of the original assessments in this respect has been fully shown above. It cannot be questioned that such original assessments resulted in imposing a heavier burden of taxation upon shareholders in this bank than upon the holders of other moneyed capital in the city of Albany. This mode of assessment has been repeatedly characterized as wrong and unjust by the courts of the State of New York.

See People v. Assessors, 2 Hun, 583.
Williams v. Weaver, 75 N. Y., 30, 33.

It was characterized in the Circuit Court by Judge Coxe, as "not only unequal and inequitable, but unnecessary and indefensible."

Stanley v. Supervisors, 15 Fed. Rep., 483, 486.

It is true that the last named learned judge decided against the plaintiff's claim to recover back taxes by reason of such inequality, and his judgment has been brought for review into this court; but even if that judgment should be affirmed, it by no means follows that this law, passed in 1883, which substantially imposes an assessment upon these shareholders with all the injustice and inequality which attended the original assessment, is valid. The act in question was enacted after the commencement of this suit, and for the purpose of defeating the plaintiff therein. It was enacted with full notice of the unequal, inequitable and indefensible action of the board of assessors of the city of Albany. The reason for its enactment was, that there had been no valid assessment of the shares in question. The money of the plaintiff and his assignors had been taken from them wrongfully, and the illegal exaction from them had been at the rate of seventy-eight per cent upon the actual value of their stock, while real estate had been assessed at only sixty per cent, and a vast majority of the stock of other banks, State and National, in the city of Albany, at a rate far less than that imposed upon plaintiff. The Legislature of 1883, by the act in question, attempted to legalize this wrong;

not only the technical wrong which had ensued from the omission to include the assessments in question in the assessment-roll until after the first of September in each year, but the substantial wrong which had been done by the unjust and unequal assessments referred to.

To say that the Legislature of 1883, could impose taxation upon these shares, by legalizing their assessment at seventy-eight per cent of their actual value, while a majority of moneyed capital in the ward was assessed at a much less rate, is to decide that the State Legislature may disregard the restriction upon the taxation of this kind of property, imposed by the Federal statute. It was virtually an enactment by the State Legislature imposing upon the shareholders of this particular bank a greater rate of taxation than was imposed by the same act on the shares of other banks, State and National.

SIXTH. WHILE WE INSIST THAT ALL THE ASSESSMENTS WERE VOID, AND WERE NOT CURED BY THE LAW OF 1883, THERE ARE SOME, TO WHICH THERE ARE STILL OTHER OBJECTIONS THAN THOSE STATED ABOVE, AND AS TO WHICH IT CANNOT WELL BE CLAIMED THAT THERE IS ANY DEFENSE.

1. Assessments to the "estate" of a deceased person are wholly void, as has been held by the Court of Appeals of this State.

Trowbridge v. Horan, 78 N. Y., 439.

Such assessments are without jurisdiction, and under the rule laid down by Cooley in regard to curative acts, cannot be made good by legislative enactment.

Cooley on Const. Lim., 383.

As to the following assessments and amounts therefore, the curative act is ineffectual, and a recovery must be had therefor:

	1876.	1877.	1878.
Estate of Gould Blakeman	$31 22	$29 36	$26 06
Estate of William Dickson	31 22	29 36	26 06
Estate of John Gould	24 97	23 50	20 84
Estate of Ebenezer Hill	218 60	205 62	182 48
Estate of James McNaughton	156 14	146 88	.....
Estate of John T. Wendover	93 66	.....	.....
Estate of Abram Wing	62 44	58 74	66 32
Estate of Peter McNaughton	.....	146 88	.....
Estate of John V. L. Pruyn	.....	.....	378 02
Estate of James Roy	.....	.....	26 06

With interest on above amounts from the times when they were respectively collected.

2. Several of the shareholders assessed in the years 1876, 1877 and 1878, died before the passage of the act of 1883. (See par. VII, p. 22.) As to these deceased persons, the provision for notice in sections 2 and 3 of the Laws of 1882, are entirely inadequate. None but the persons themselves, if living, could swear as to their financial condition at the time of the respective assessments. No notice to their personal rep resesentatives is provided. The following are the assessments and amounts to which this principle applies:

	1876.	1877.	1878.
William J. Blackall	$43 71	$41 12	$36 48
Martha P. Butler	31 22	29 36	26 06
Nicholas Clapper	34 34	32 30	.....
Amelia A. Cobb	156 14	146 88	130 40
Thomas Comstock	62 44	58 74	.....
Theodore F. Cornell	78 07	73 44	65 16
Ann Darling	31 22	29 36	26 06
Daniel A. Gardner	12 49	11 74	10 43
Peter Monteath	31 22	29 36	26 06
John V. L. Pruyn	452 82	425 94	.....
James Roy	31 22	29 36	.....
James C. Visscher	15 61	14 68	13 02
Richard Van Rensselaer	.....	2 92	2 06
Harriet Hilton	31 22	29 36	26 06
Thomas H. Van Loon	21 32	29 36	26 06

SEVENTH. THERE IS NO DOUBT THAT THIS ACTION CAN BE MAINTAINED, IF THE ASSESSMENT WAS ILLEGAL, FROM WHATEVER CAUSE.

Newman v. Supervisors, 45 N. Y., 676.
Nat. Bank of Chemung v. Elmira, 53 N. Y., 49.
Horn v. Town of New Lots, 83 N. Y., 100.

The cases cited below by the learned counsel for the defendant, holding that an action to recover back taxes paid could not be sustained, except where the assessment had been set aside by legal proceedings, have no application here. They were cases of voluntary payment, or of payment by "coercion by law," in distinction from "coercion in fact."

See Peyser v. Mayor, 70 N. Y., 497.
Wilkes v. Mayor, 79 N. Y., 621.
Bank of Commonwealth v. Mayor, 43 N. Y., 184.

In this case, an actual levy was made, and the taxes forcibly collected. It is so alleged in the complaint and admitted. (See complaint, pp. 2, 6, 10, par. III, p. 27, par. I, p. 25.)

The case of *Swift* v. *City of Poughkeepsie*, 37 N. Y., 511, has been overruled by *Bank of Chemung case*, 53 N. Y., above cited, and by other cases.

See also Horn v. New Lots, 83 N. Y., 100.

Here, it is conceded that the original assessment was without jurisdiction and void. The defense is under an alleged legislative assessment by the act of 1883. If, for any reason, that act is unconstitutional and void, it cannot aid the defendants to keep the money obtained under an illegal and void assessment.

EIGHTH. THE FACTS SET UP IN THE THIRD PARAGRAPH OF THE ANSWER (PAGE 18) CONSTITUTE NO DEFENSE.

The plaintiff could not so ratify and acknowledge the validity of an unconstitutional law as to make it constitutional and valid.

Nor is there any basis for claiming an equitable estoppel if such there could be. Mr. Williams, as assignee of various shareholders, claimed that the entire tax was illegal; he had sued to recover it back; the Legislature provided a way under which he was enabled to get back a portion of what was due him. While he insisted that the law was unconstitutional and void, he was willing to get what belonged to him under the law if he could, or so much of it as he could get. No doubt if the county had repaid the entire sum in pursuance of plaintiff's demand, that would have been a good defense *as payment;* and the sums which were actually paid, as appears by par. V, p. 26, are to be credited as payments in this case; but to no greater extent can it be successfully claimed that this suit is affected by the payments made under the law of 1883.

The defendant's propositions are two: (1.) That the act of 1883 "is one whole piece," so that no part of it can be separated from the remainder and held valid, while rejecting the other part; and (2.) That the plaintiff, by accepting certain benefits under the act, is estopped from denying its constitutionality in all its parts.

Neither of these propositions is sound.

1. The rule as to the construction of statutes has been well settled by this court.

"It is an elementary principle that the same statutes may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. * * * The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature."

Allen v. Louisiana, 103 U. S., 80, 83, 84.

"Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every other case of statutory construction, all depends on the intention of the Legislature, as shown by the general scope of the law. * * * Under these circumstances it seems to us that the unconstitutional part of the statute may be stricken out, and the obligation of the company including its statutory mortgage in favor of the State bondholders left in full force. The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as if that provision was not there."

R. R. Companies v. Schutte, 103, U. S., 118, 142.

"In a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded."

Supervisors v. Stanley, 105 U. S., 305, 312.

2. Applying the principle above enunciated to the act in question, we find that the Legislature had in view two separate and independent objects. The first was to legalize the assessments contained in the assessment-rolls of 1876, 1877 and 1878. The second was to provide for refunding to certain of the shareholders of national banks taxes which had been improperly collected from them.

These two purposes appear clearly from the act itself. Certain facts with which the court is familiar, and some judicial decisions which either party has a right to refer to under paragraph XVI of facts admitted (p. 32) illustrate these purposes. These assessments were made and moneys collected under the act of 1866, which, as

construed by the courts of the State of New York, did not permit any deduction from assessments of this kind of property, for indebtedness.

People v. Dolan, 36 N. Y. 59,

This law, as thus construed, was held by this court to be a violation of section 5219 and void as to persons indebted.

People v. Weaver, 100 U. S., 539.
Supervisors v. Stanley, 105 U. S., 305.

At the time these taxes were assessed and collected all demands for deduction were disregarded by the assessors, and they had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation.

Hills v. Exchange Bank, 105 U. S., 319, 321.

The defendants then, in consequence of this conduct of the assessors, acting under decisions of the State courts, but in violation of the law of the United States, had received moneys collected from persons to whom a deduction should have been allowed for indebtedness. The county of Albany was under a moral obligation certainly to make restitution to these persons.

This action and another had been brought to recover back taxes collected, on various grounds of illegality. The legislative purpose, so far as it can be gathered from the act itself, and the construction put upon it by the assessors, was to recognize the moral obligation to refund *to persons indebted* the sums collected from them by a law pronounced by this court to be unconstitutional as to them, and to legalize and validate the assessments as to all other persons. These two purposes were independent and distinct. One was constitutional and proper; the other, as we claim, the Legislature had no power to accomplish. The substance of the law, as shown by the practical construction put upon it by the assessors, may be stated as follows:

§ 1. The assessments contained in the assessment-rolls of the respective wards of the city of Albany, for the years 1876, 1877 and 1878, are hereby in all things legalized and confirmed, except the assessments against such persons as were indebted.

§ 2. The taxes collected from the estate of C. W. Bender, Mrs. Maria Bender, Sylvester Hale and Lemon Thompson, on assessments upon their stock in the National Albany Exchange Bank in

the years 1876, 1877 and 1878, shall be repaid to them respectively by the treasurer of the county of Albany, for the reason that these persons were, when assessed, indebted to an amount sufficient to cancel the assessments against them.

Can there be any doubt that under a statute like the above, the plaintiff, as assignee of the parties named in the second section, might receive the moneys refunded without estopping himself as assignee of other shareholders from questioning the validity of a legalizing clause in the first section?

3. The cases cited below by defendant's counsel do not sustain his position.

(*a.*) *Ferguson* v. *Landram*, 5 Bush., 230, was an equity suit, where the plaintiffs sought to restrain the collection of an unconstitutional tax. It was held that those of the plaintiffs who had participated in the procurement of the passage of the act, and had received benefits under it, could not sustain the suit. This was put upon the familiar maxim "that he who seeks equity, must do equity," and it was held that the parties referred to were not in a position to ask a court of equity to aid them in escaping their share of a tax imposed by an act which they had procured to be enacted.

There is no pretence in this case that the plaintiff procured the passage of the act. It will not be denied, on the other hand, that he strenuously opposed its passage at every stage.

(*b.*) As to the other cases cited by defendant's counsel, it is sufficient to say that they have no application whatever to any question involved here. They simply hold that a party may waive a constitutional right, which we do not deny. The cases may be divided into two classes: (1.) Where there was an express waiver, or an express consent, as in *Lee* v. *Tillotson* (24 Wend.), 327, and *Embury* v. *Connor* (3 N. Y., 511); or (2.) where the party had availed himself of the act or judgment in question to obtain a benefit to which he would not otherwise have been entitled, as in

Mills v. Hoffman, 92 N. Y., 181.
In re. Cooper, 93 N. Y., 507.
In re. Woolsey, 95 N. Y., 135.

This case comes under neither head. The assessment is conceded to have been void. If the legalizing part of the act of 1883 was

also unconstitutional and void, then the moneys in question belonged to plaintiff, and it was the duty of the defendant at once to restore them all. In restoring the amount collected of the parties named in paragraph V the county performed only a *part* of its duty, and in receiving such payment, the plaintiff obtained only a part of what belonged to him. It is believed that no case can be found in which a plaintiff, by receiving a portion of his dues, tendered him unconditionally, has been held to have waived his right to the balance.

4. The principles of estoppel and waiver have no application to the facts in this case. All the familiar elements constituting estoppel *in pais* are wanting. (1.) There was no admission by plaintiff inconsistent with this claim. His claim was that *all* the assessments were void, and that the money illegally collected should be refunded. There was no inconsistency therefore on his taking a *part*. (2.) There was no action on the part of the defendant, induced by any act or admission of plaintiff which will injure it. If our contention is correct, the defendant was legally liable to pay us the whole amount of our claim; it certainly suffered no injury by paying a part, for which it conceded its liability.

Nor is there any ground for claiming a waiver. A plaintiff, by the receipt of the amount of a judgment in his favor, is not precluded from appealing on the ground that the recovery should have been greater.

United States v. Dashiel, 3 Wall., 688.
Embry v. Palmer, 107 U. S., 3.
Clowes v. Dickinson, 8 Cow., 328.
Higbie v. Westlake, 14 N. Y., 281.
Benkard v. Babcock, 2 Rob., 175.
Barker v. White, 58 N. Y., 204.

The principle of the above cases is controlling here. In some of these cases the plaintiff got the money by issuing execution upon his judgment; but the courts uniformly held that the receipt by the plaintiff of the amount of his judgment was not a waiver of his right to appeal, and to claim on the appeal that he should have recovered more.

A party does not waive his right to remove his suit from a State court to the United States Circuit Court by remaining in the

State court and contesting the case on the merits, after an improper denial of his motion to remove.

Insurance Co. v. Dunn, 19 Wall., 214.
Removal Cases, 100 U. S., 457.
Railroad Co. v. Mississippi, 102 id., 135.
Railroad Co. v. Koontz, 104 id., 5, 14.

The right to appeal from an order of reference is not waived by trying the case on the merits before the referee, the motion for a reference having been opposed.

Brown v. Mayor, 9 Hun, 587.
Kain v. Delano, 11 Abb. (N. S.), 29.
Read v. Lozier, 31 Hun, 286.

5. It must be remembered that we are not taking any affirmative action to set aside the act of 1883, or to restrain action under it. We brought suit for our moneys, conceded to have been wrongfully taken from us. The defendant procured the passage of the act, and had inserted in it a provision authorizing the county to pay us a part of what belonged to us. We took what they paid, protesting at the same time that we ought to have the whole, and insisting that the act was unconstitutional and void so far as it undertook to legalize and confirm the assessments. (See notice above set forth in point fourth, sub 5, *supra*.) There can be no pretense that there was in fact any acquiescence by plaintiff in the legalizing part of the act, or any intention on his part to waive his objections to it.

6. Plaintiff sued upon several distinct and independent claims assigned to him by different persons. Strictly there should have been a separate count for each claim, but for convenience and to avoid intolerable prolixity all for each year were grouped in a single count. Some of the claims so assigned were paid in full by defendant. As to each of the claims so paid his cause of action is satisfied. But the receipt of such payment and satisfaction cannot affect his right of action upon the other claims assigned to him, or estop him from questioning the validity of the act purporting to legalize the transactions on which such other claims are based.

The judgment of the Circuit Court should be reversed, and judgment directed for the plaintiff for the sums claimed in the complaint, deducting the payments made and received under the law of 1883.

MATTHEW HALE,
Attorney and of Counsel for Plaintiff in Error.

122-154

MAR 10 1887

Supreme Court of the United States.

No. 387.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

REPLY TO BRIEFS OF DEFENDANT IN ERROR.

MATTHEW HALE,
Attorney and of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 387.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

REPLY TO BRIEFS OF DEFENDANT IN ERROR.

I.

Most of the propositions urged in the brief and supplemental brief of the defendant in error are anticipated and fully discussed in our principal brief; but some of the statements of fact are so erroneous and so at variance with the evidence and admissions in the case that a few corrections seem necessary.

II.

Upon page fifteen of their principal brief the learned counsel for the defendant, in referring to our objection that there was unlawful discrimination against the plaintiff and his assignors, as holders of the bank shares in question, say:

"The assessment was the same as is referred to in the Stanley case. *No proof whatever on this subject exists here, and no illegality being alleged or proven, excepting as to the oath and the manner of assessing as to the lists of stockholders,* none other will be presumed by the court."

This is in substance a statement (1) that there is no *allegation* in this case of the unlawful discrimination; (2) that there is no proof whatever on the subject. Both these statements are erroneous, as a glance at the record will show.

(*a*) The allegations in the complaint of such unlawful discrimination may be found at pages 5, 8, 9, and 12 of the record.

(*b*) The proof on the subject is contained in the admissions in paragraphs X to XV (both inclusive), pages 31 and 32 of the record. These admissions prove all the facts in the evidence and findings in the Stanley case, stated with even more precision and fullness than in that case.

II.

This case, however, in respect to this question, is not the same as the Stanley case. Even if the action of the assessors in that case should be upheld, it by no means follows that the act of the Legislature in attempting to validate the assessments in this case can be sustained. This is pointed out in the fifth point upon page 33 of our principal brief. The Legislature enacted the law of 1883 with the complaint in this case before it. It was passed for the express purpose of defeating the plaintiff in this action. The framer of the law well knew, and the Legislature must be presumed to have known, that the assessors had imposed

the same tax upon each of the shares in question, of the actual value of from $125 to $130, which they had imposed upon each of the shares of the Mechanics' and Farmers' (State) Bank; worth $285, and upon each of the shares of the National Commercial Bank, worth $260. (See par. XIV, p. 32.) It knew that the shares of the Mechanics' and Farmers' Bank, of the actual value of $937,500, were assessed for taxation at only thirty-five per cent. of their actual value; that the shares of the National Commercial Bank, of the value of $750,000, were assessed at only thirty-six per cent., while the shares in the National Exchange Bank were assessed at seventy-eight per cent. of actual value. (See table on page 15 of our principal brief.) It knew that $3,534,500 in value of other moneyed capital in the shape of bank shares had been assessed at a much *less* rate than the shares in question, while only $450,000 of such other moneyed capital had been assessed at a greater rate. (Page 15 of principal brief, after table.) With this knowledge, and for the express purpose of legalizing and perpetuating this unlawful discrimination, chapter 345 of 1883 was enacted. A more deliberate and determined attempt by a State Legislature to overthrow and destroy an immunity created by the laws of the United States for the protection of corporations organized under the authority of the United States has never been brought to the attention of this Court.

III.

The statement on page 15 of defendant's principal brief that the laws of New York afforded a remedy for the direct review of the assessment in question is erroneous. Chapter 345 certainly gives no such remedy. No provision is made

for an appeal or review. The general law of 1880, providing for a review of illegal, erroneous, or unequal assessments, is applicable only to assessments thereafter to be made.

See Chapter 269 of Laws of New York for 1880.

IV.

The case of R., W. & O. R. R. Co. *vs.* Smith, 39 Hun., 335, quoted by defendant's counsel upon page 23 of their principal brief, does not aid defendant.

In that case it was held that the oath actually taken by the assessors, which was in conformity with the law of 1851, was a substantial compliance with the law amending the form of oath, enacted in 1885.

In this case no legal oath was *ever* taken by the assessors, and, by assessing real estate at only 60 per cent. of its actual value, the rate of taxation imposed upon the shares in question was largely increased.

V.

The plaintiff and his assignors have been persistently deprived of the equal protection of the law, and subjected to an excessive rate of taxation by the State authorities.

Their claims to equal and just treatment have been uniformly and deliberately denied (1) by the assessors, and (2) by the Legislature. Their claim has always been "that it was the duty of the assessors to assess all property, including bank stock, at its true and actual value. (Par. XIII, p. 31.)

In his demand, made of the assessors under the act of 1883, plaintiff asked them, in case they refused to cancel the assessments, for a reduction, "so that the assessed value of such

shares shall not be greater, in proportion to the actual value thereof, than the rate imposed" on other moneyed capital.

See Record, p. 33.

Failing in all these just and reasonable requests, except so far as by the decision of this Court in The People *vs.* Weaver, the State authorities were compelled to allow a deduction for indebtedness, which they had theretofore steadily denied, he has brought this action, based upon the deliberate, systematic, and persistent refusal to grant him and his fellow-shareholders the equality guaranteed to them by the Constitution and laws of the United States.

VI.

The statement on page 2 of defendant's supplemental bill that our sixth point (principal brief of plaintiff, p. 34) is not raised by the record is erroneous.

See complaint, Record, pp. 5, 8, and 12.

Exceptions II, VI, and VII, pp. 39, 40.

Assignments of Error, 10, V, VI, and VII, pp. 46, 47.

VII

The claim that plaintiff waived his right to prosecute this action by accepting the sums paid him, as stated in par. V, p. 26, of record, is perhaps sufficiently discussed in our principal ~~bill~~ brief.

The following statement of the law on this subject, made by this Court in a recent case, is so plainly applicable to the facts of this case and so conclusive, that its quotation is a sufficient refutation of the contention of the defendant:

"No waiver or release of error, operating as a bar to the further prosecution of an appeal or writ of error, can be

implied, *except from conduct which is inconsistent with the claim of a right* to reverse the judgment or decree which it is sought to bring into review. If the release is not expressed, it can arise only on the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is the controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous, nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled, for they cannot deny that this sum, at least, is due and payable from them to him."

Embry *vs.* Palmer, 107 U. S., at page 8.

The judgment should be reversed, &c.

MATTHEW HALE,

Attorney and of Counsel for Plaintiff in Error.

122-154

MAR 7 1887
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 387.

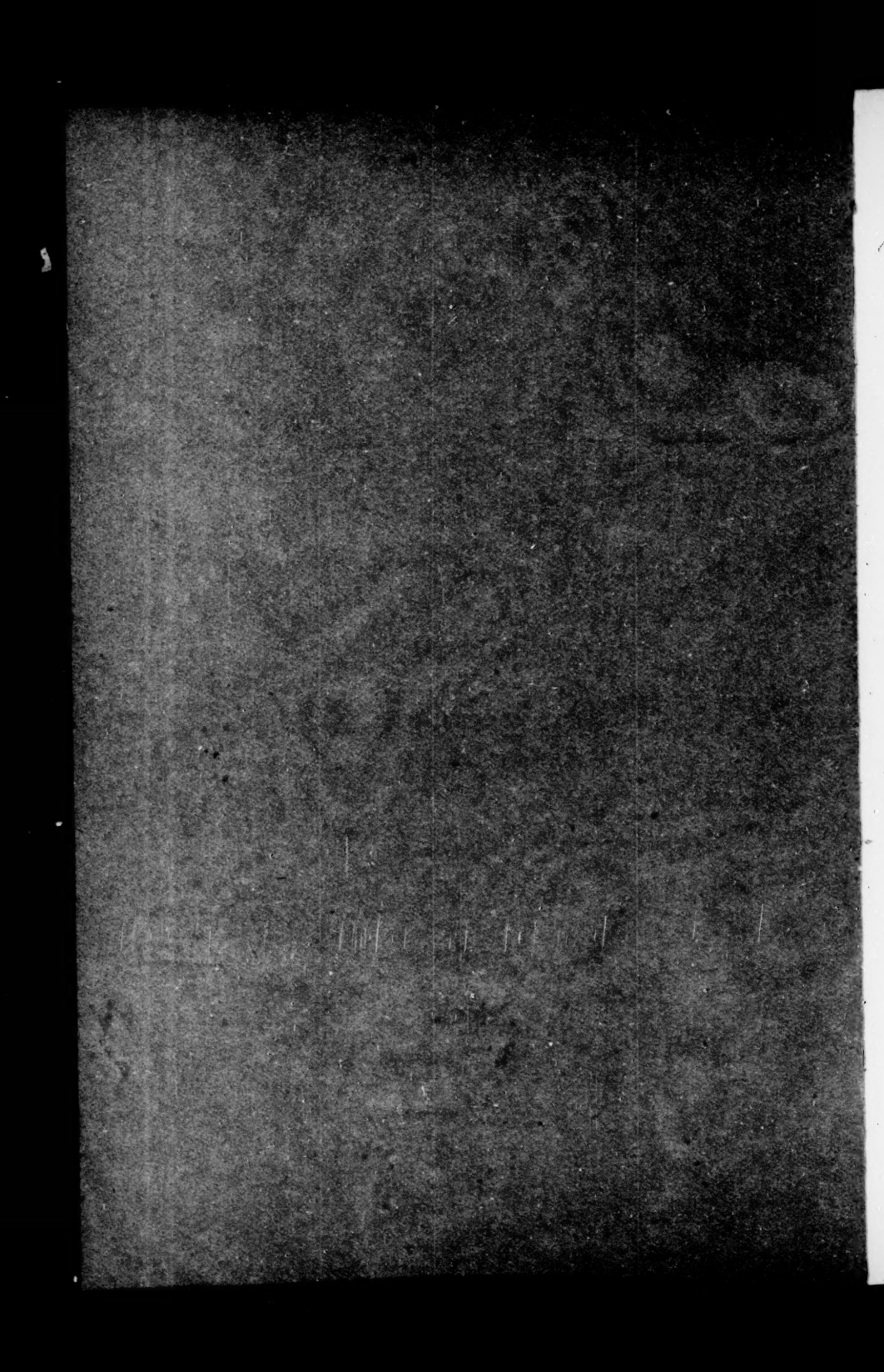
CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

WHEELER H. PECKHAM,
SIMON W. ROSENDALE,
Of Counsel for Defendant in Error.



Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 387.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

WHEELER H. PECKHAM,
SIMON W. ROSENDALE,
Of Counsel for Defendant in Error

UNITED STATES SUPREME COURT.

No. 387.

CHAUNCEY P. WILLIAMS, PLAINTIFF IN ERROR,

AGAINST

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

This action was commenced in the State court, in March, 1883, and is brought to recover from the county of Albany, certain taxes collected from various shareholders on sundry shares of the stock of the National Exchange Bank, for the years 1876, 1877, 1878. These shareholders assigned their claims to C. P. Williams, plaintiff, who assigned to Edward N. Stanley, the plaintiff in the action argued concurrently herewith. While Stanley was the owner of these claims, he brought action thereon and was defeated by the determination of this court. (105 U. S., 319.)

Subsequent to that time, failing to obtain an amendment to his complaint to the extent desired by him, he discontinued that action as to counts 10, 11, 12 (to recover the taxes for 1876, 1877, 1878), reassigned the claims to plaintiff Williams, and this action was brought by Williams.

The complaint charges the invalidity of the tax for the years 1876, 1877 and 1878, for the same reasons stated in the Stanley case, and adds as additional reasons, that owing to certain alleged informalities, the assessments were invalid.

Complaint, pp. 1-18.

The defendant answered:

1. A general denial, or the general issue.
2. That the informalities were cured by a validating act.

3. That plaintiff having made a claim, and taken benefits under, said act, had ratified it and acknowledged its validity.

Answer, p. 18, fol. 13.

The case was removed to the United States Circuit Court by the plaintiff.

Transcript of Record, p. 19.

A jury trial was duly waived (see Waiver p. 22, fol. 24), and the case tried before Judge Wallace, who decided in favor of defendant.

Decision, p. 23, fol. 25, and Opinion, p. 40, fol. 47.

The case is reported below, under the head, The Exchange Bank Tax cases, Williams v. The Board of Supervisors.

21 Federal Reporter, 99.

The questions presented in this case, as to whether the tax on the shares conforms to the statute, in not being assessed at a greater rate than other moneyed capital is assessed, are precisely the same as those presented in the Stanley case, No. 222, of this term, and we shall not again argue them.

This case, however, presents certain questions not in the Stanley case.

Plaintiff in error claims that the assesments against his assignors, on account of bank stock in the National Albany Exchange Bank, in 1876, 1877 and 1878, were void for two reasons.

1. Because they were not made a part of the assessment roll.

2. That the assessors did not take a sufficient oath.

Defendant in error claimed, that the facts did not make the assessments invalid, and that if they did, such invalidity was cured by validating act, chapter 345, Laws of New York, of 1883; set out on page 37, of the Record.

The facts were agreed to, by stipulation (Record, pp. 25 to 34 and 35, inclusive), and there is no exception to the admission or exclusion of the evidence.

The findings of fact simply are, the facts as admitted by the pleadings and stipulation, pp. 38, 39.

The affidavits referred to in the short stipulation, (p. 34), are testimony, but the findings do not pass upon them.

The court below held as a conclusion of law:

1. That the assessments were illegal, because not imposed in conformity to the laws of the State of New York.

2. That they violated no law of the United States.

3. That the validitating act of 1883 was effectual.

4. That defendant was entitled to judgment. (Record, p. 39.)

Plaintiff in error took seven exceptions (stated on pp. 39 and 40), and has here filed seven assignments of error, the substantial equivalent of the exceptions. (Pages 46, 47).

The second exception (p. 39), and the fourth assignment of error raise the question whether the validating act chapter 345, of the Laws of 1883, was effectual to cure the illegalities found by the court to exist in the original assessment.

The other exceptions and assignments of error raise questions of invalidity, because of alleged conflict with the constitution, or laws of the United States.

POINTS.

I.

CHAPTER 345, OF THE LAWS OF NEW YORK FOR 1883, WAS VALID, AND EFFECTUAL TO LEGALIZE AND CONFIRM THE ASSESSMENTS THEREIN PROVIDED FOR.

A. The defects existing in the assessments were not such as rendered them *void;* they were irregularities merely.

The oath as to real estate did not conform to the requirements of the State law, and assuming, for the sake of the argument, that it was a defect, that the list of shareholders was not actually written on, or fastened to, or bound with, the assessment-roll, before September first. These were regulations made by the State laws, and each of which could originally have been otherwise provided for, or changed, or omitted altogether by the Legislature. They were not of the essence, they did not involve any of the *jurisdictional* provisions, such as notice to the taxpayers.

"If the Legislature possess the power to authorize the act to be "done, it can, by a retrospective act, cure the evils which existed,

"because the power thus conferred has been irregularly executed."

Welty on Assessments, p. 384, citing Thompson v. Lee county, 3 Wall., 327, and other cases.

Whatever the Legislature might have originally dispensed with, may, when omitted, be cured by a healing act.

Cooley, Constitution Limitation, 5th ed., p. 458, 471 (* 372, 382).

If any of the acts required by the law to be done, and which are defectively performed, might have been dispensed with in the first instance, such defects or omissions may be cured by retroactive legislation.

2 Desty on Taxation, 617.

The doctrine of *omnis ratihabitio retrotrahitur et mandato priori æquiparator*, is applicable to curative legislative enactments.

Mattingly v. District of Columbia, 97 U. S., 687.

(*B.*) The statute in question, provided for an opportunity to be heard. The taxpayer had an opportunity to present any reason that was a good one in the year when assessed, why deductions should be made, or the assessment canceled outright.

It gave therefore, in effect, the same notice that a taxpayer would originally have had.

1. This right to a hearing and opportunity to present reasons for canceling or reducing the assessments is substantially all that the citizen can ask.

Such citizen gets the benefit of all that he could have had if the opportunity for the hearing had been given him in the first instance, and whatever he shows that he should be credited with, he is to receive back with interest from the time when he was assessed up to the time of the payment of the money back to him.

The act in question does not arbitrarily levy a tax upon any body of men, without apportionment, so as to come within the hypothesis put by Judge Rapallo, in Gordon v. Cornes (47 N. Y., 608).

The original tax was levied for general purposes, and formed the annual tax against the shareholders, for their portion of the amount necessary to carry on the government, and to pay their share for its benefits. If it be said that the apportionment was arbitrary, because no hearing was allowed or provided for, the answer is, that the hearing is now provided for in the act of 1883, and there is no pretense of a tax upon the people owning stock in that bank, separate or apart from the general tax upon them and every one else, for the support of the civil government.

2. Although the State cannot take property of the citizen, excepting for public purposes and upon due compensation, yet an act authorizing the State to immediately enter upon such private property for the purposes of making a canal, was held valid, because it gave the citizen a year in which to exhibit his claim for such compensation, and provision was made for the payment by the State of the amount of the award.

Rexford v. Knight, 11 N. Y. 308, affirming same principle in Bloodgood v. The Mohawk and Hudson Railroad Co., 18 Wend., 9.

It is the *opportunity* for hearing and provision for payment before he is finally and forever excluded, that makes such an act of appropriation legal.

The *taking* is really at the time without compensation, for the State enters upon the land at once and appropriates it to a public use. But *thereafter* the citizen can make his claim, and when adjusted, it is to be paid. In that way and in substance the legal requirement is fulfilled.

3. Suppose an act of the legislature provided for an immediate entry upon and appropriation of the lands of the citizen by the State, through its agents or officers, and made no provision for any payment for the same at any time, and that pursuant to such act, its officers did enter upon and appropriate the land. Assume that the owner then commenced an action of ejectment, or took other and appropriate legal proceedings, against the persons acting under the law on the part of the State, to recover possession of the land and damages sustained by the taking, on the ground that the original

taking was absolutely illegal. Can it be asserted that the State has not power, in such a case, to pass an act providing for proceedings to be taken by the citizen, in which he could make his claim, and providing for a hearing thereof and payment of the amount, and then validating the original entry on the land. It seems most clear that the State has such power.

4. If, in the case above supposed, such power exists, where is the difference in principle, when the State, assuming to take money for public purposes under the taxing power, has failed to give the proper notice to the citizen, who has thus been compelled to pay without opportunity of being heard, and, when such fact is brought to the notice of the State, an opportunity is at once afforded the citizen to show any ground for the reduction or cancellation of the assessment, and means are provided for the repayment to the citizen of the amount which had been improperly taken from him, with interest on it, from the time of taking up to the time of repayment, and the balance of the tax is validated? What reason can be alleged why such an act should not be valid?

5. The citizen owes a duty to the State to pay taxes. The proceedings to impose and collect taxes are at least colorable.

Proceedings to tax are not like taking property of the citizen *in invitum*.

Kelly v. Herrall, 20 Fed. Rep., 364.

In which case the following quotation from Cooley's Taxation, 383, note, is made and approved: "The proceedings in "the assessment of a tax are not, in any proper sense hostile to the "citizen. They are, on the other hand, proceedings necessary and "indispensable to the determination of the exact share which each "resident of property owner ought to take, and may and ought to "be supposed desirous of taking, in meeting the public necessity for "a revenue; proceedings which the willingness of the taxpayer "cannot dispense with, and which only become hostile when the "duty to pay once fixed, fails to be performed by payment."

"Then, and then only, do the steps taken by the government "assume a compulsory form. Until then, the reasonable presumption "is that government and taxpayer will act together in harmony, "and that the latter will meet his obligation to pay as soon as the "former has performed its duty in determining the share to be paid."

6. In the original assessment, notice was duly given, and in all respects, as to procedure, it was correct excepting as to oath, and the matter of the lists, and now in the validating act he has opportunity to be heard.

The citizen has thus had his day in court. He has been heard, and any excess over the amount that he ought to have paid, is refunded. Should he escape entirely, by reason of the former error, from ever paying a dollar for taxes during those years?

7. Taking into consideration the great power (as evidenced by the following authorities) of the Legislature over this whole question of taxation, it would seem as if there could be no doubt of the power thereof to pass the act in question. There must be some plain violation of some restriction contained in the constitution, for otherwise the legislative power over taxation *is infinite.*

Per Marshall, Ch. J., in Providence Bank v. Billings. 4 Pet., 514, 561, 563.
McCulloch v. Maryland, 4 Wheat., 316, at 428.
People v. Mayor of Brooklyn, 4 N. Y., 419, 426.
People v. Flagg, 46 N. Y., 401.
Weismer v. Village of Douglass, 64 N. Y., 91.
In re Van Antwerp, 56 N. Y., 261.
Spencer v. Merchant, 100 N Y., 585–588.
See, also, Thompson v. Perrins, 103 U. S., 806; Thompson v. Perrins; 106 U. S., 589.
Mattingly v. Dist. of Col., 97 U. S., 687.
Note in 16 Fed. Rep., 201.

8. Where there was municipal jurisdiction of the subject-matter, the acts can be validated.

Tifft v. Buffalo, 82 N. Y., 204.
People v. McDonald, 69 N. Y., 362.

C. The power of the Legislature to pass acts similar to chapter 345 *of the Laws of* 1883, *has been frequently approved by the courts of the State of New York.*

In Brevoort v. The City of Brooklyn (89 N. Y., 128), the Court of Appeals of New York held an assessment levied in Brooklyn invalid because of a defective oath taken by the assessors. The Legislature, by chapter 363 of Laws of 1882, validated and confirmed such assessments as to all unpaid taxes, and the

validity of such an act was passed upon in, In re Mary Clementi v. Jackson, Registrar, etc. (92 N. Y., 591), and upheld.

In the case of Stuart v. Palmer (74 N. Y., 183), an assessment was declared void by the Court of Appeals, because the act imposing the assessment failed to provide for notice to the persons to be assessed.

Subsequently the Legislature (chapter 689, Laws of 1881) passed an act authorizing the Board of Supervisors to levy the amount of the former assessment, *with interest*, upon the lands against which the former void assessment had been made. The validating act provided for notice to the land owner to be assessed.

The Supreme Court of the State of New York, in Lang v. Kiendl, 27 Hun's Rep., 66, passed on that act, and decided it to be valid, holding, that, upon giving opportunity to the person to be heard, *the Legislature had unrestrained power of taxation*, pp. 67, 68. The same validating act was passed upon by the Court of Appeals, in Spencer against Merchant, 100 N. Y., 585. Here the validating act was attacked, because of its unconstitutionality, but the court held it to be valid.

D. So far as equality in taxation is concerned, there is nothing in the New York State Constitution providing for it, or providing even against double taxation.

People v. Home Ins. Co., 92 N. Y., 328.

The Constitution of the United States does not, in all cases, protect against unjust or even oppressive taxation (see Memphis Gas Light Co. against Taxing District, 109 U. S., 398) and mere injustice, therefore, does not (even if conceded) give a cause of action.

II.

THE OBJECTION TO THE LAW, THAT THE ACT IN QUESTION DOES NOT APPLY TO CASES WHERE THE TAX HAS BEEN COLLECTED, IS NOT WELL TAKEN.

(*a.*) The act, *in its very words*, applies to just such a case, of a tax collected.

Section 1 applies to shareholders, in national, or state banks, the assessments against whom *were collected by process of law.*

Section 1, chapter 347, Laws of 1883.

(*b.*) The whole scheme of the act applies especially to just such cases, of taxes collected, and the act is absolutely meaningless upon any other construction.

(*c.*) Unless restricted by the terms of the act, it would apply to proceedings or actions pending at the time of its passage.

Kilmer v. McDonald, 69 N. Y., 362.

III.

THE ACT IN QUESTION IS NOT IN VIOLATION OF THE UNITED STATES CONSTITUTION AS DEPRIVING PLAINTIFF OF HIS PROPERTY, WITHOUT DUE PROCESS OF LAW.

1. The original assessment was made after due notice given, and in this validating act provision is made for, and notice and opportunity to be heard were given.

The taking of the moneys of plaintiff's assignors, under the general law relating to taxes, and the validating act was a taking by due process of law, which does not necessarily contemplate a taking by procedure in the courts.

Kelly v. Pittsburgh, 104 U. S., 78.
See Kelly v. Herrall, 20 Fed. Rep., at p. 369.

Among the cases cited below by plaintiff's counsel, from the Illinois Reports, is that of Marsh v. Chestnut (14 Ill., 223.)

The court held, that the taxpayer never had an opportunity to be heard, such as the law contemplated, before he was charged with the amount of the tax, and that the statute therein referred to in relation to assessments, did not and was not intended to validate the void assessment against the taxpayer. It was a different action from the one at bar, being in ejectment, and the difference will be hereafter adverted to.

The court, from a perusal of the act itself, held that it was not intended to have any application in such a case as was there presented.

The case of Billings v. Delten (15 Ill., 218) is the same in principle as the foregoing. The facts showing that by the action of the assessors, the taxpayer *had never had a chance to be heard.*

The property of the taxpayer (real estate), upon such an assessment was sold, and the defendant came in possession thereof under such sale for this unpaid assessment. The court held the sale and title void by reason of this void assessment, and reversed a judgment in favor of the defendant. The court held as a matter of law, that the act under which defendant claimed the said assessment was validated, did not apply; that it should receive the same construction as the act did in the case cited in 14 Illinois, and that the act was passed for the purpose of facilitating the collection of the revenue, and not to protect the titles of purchasers at tax sales.

The case of Conway v. Sable (37 Ill., 82) is of a like nature. There the land of the party illegally taxed had been sold, under circumstances which made the sale absolutely void, so that no title passed. The plaintiff filed a bill in equity to set aside the conveyance under the tax sale, etc., and the Supreme Court reversed a judgment in favor of defendant in the court below, and held that the action was well brought, and that the curative statutes did not apply to past cases.

But all these cases are radically different from the case here.

A *void* assessment which gives no jurisdiction to sell, or a noncompliance with the provisions of a statute as to taxation, even if not jurisdictional, but which renders the sale void so that no title passes, is a very different thing from this case.

In the Illinois case the taxpayer was the owner of real estate which persons assumed under color of law, but in reality without any right whatever, to sell and to give title to the purchaser by virtue of such sale. In law, no title whatever passed to the purchaser, and so far as the owner was concerned, he was in the same condition legally as to his ownership, as if no proceedings had been had. The property was his, he owned it just as absolutely and fully, after the sale as before it.

The same remarks apply to the case of Forster v. Forster (129 Massachusetts, at 559–566), cited by the plaintiff.

2. In the case at bar, certain directions of the statute were not

observed, and the assessment made, and tax *collected*, without observing these directions. The validating act says, as the original act might have said, that such directions need not be followed, and that without them the assessment is valid. It then carefully protects all the rights of the taxpayer, by providing for his being heard, and the return of any amount, which it shall appear that he has paid, and to which he is entitled.

3. The question now up, so far as this point is concerned, is, whether the State Legislature, in its plenary authority to tax, cannot so validate that prior assessment as to make it valid, if and upon condition that the person whose property was thus taken for a tax shall have an opportunity to now be heard and a chance to give any and all reasons existing at the time of the original assessment, why it should be reduced or canceled, and if upon such hearing any such reason appears, a right be given him to have the amount repaid to him.

Why should not such an act be valid? The result is, that the taxpayer only pays what he has always been bound to pay, viz., his proper proportion of the public burden.

If this be not in the power of the Legislature, then the Legislature must make a new assessment for the amount that is properly due from the taxpayer for his share of the moneys due the State. We know the counsel for plaintiff strenuously contends that even this cannot be done.

We know that by the claim as made by the plaintiff, any mistake once made by assessing officers in assessing property, by which a levy under it is void, can substantially never be remedied, and that any amount thus collected can be recovered back by the taxpayers, at the expense of the other taxpayers of the community, who must thus pay not only their own but also the shares of taxes due from those other parties, because, in some stage of the prior proceedings, the assessors failed to strictly perform or fulfill the mandates or provisions of the statute.

We do not believe any such rule will obtain. Under this conditional validating act, the plaintiff and his assignors had full opportunity to be heard, and plaintiff, as matter of fact, was heard as to his claims as assignee, and some of them allowed. He has had full

and entire justice, but now wishes to make money out of the action of the assessors at the expense of the balance of the taxpayers of the city.

Of course, under the proofs, the plaintiff has no other or greater right to this money than his assignors would have had. He must abide by the case of his assignors, and when he purchases a mere right of action under such circumstances, he does so subject to the right of the Legislature to validate an assessment upon conditions mentioned in its act, and hence the plaintiff is the subject of no hardship.

IV.

THE TAX WAS APPORTIONED IN AND BY THE VALIDATING ACT.

There was an apportionment of the tax so far as required. Originally there was an apportionment, for each shareholder was taxed upon his shares at a certain rate, and then the whole amount of tax to be collected was divided between these shareholders in a proportion fixed and proper. This amount has been validated, subject to the right of each to obtain a cancellation or reduction, etc.

The idea that if there be any error in a valuation of a taxpayer's property, by which it may be assessed at a greater relative value than the same kind of property of some other taxpayer, that such error constitutes a failure to apportion, and that a failure to apportion makes a void assessment, which it is impossible to validate, is on a par with the general modesty of the plaintiff's claim. If such was the law, not one assessment in a million could stand, and an assessment would be rendered void for causes which heretofore have not been regarded as even irregular.

Spencer v. Merchant, 100 N. Y., 585.

V.

THE OBJECTION, THAT THE CURATIVE ACT DID NOT ALLOW THE ASSESSORS TO REVIEW THE ORIGINAL ASSESSMENT, ON THE QUESTION OF UNLAWFUL DISCRIMINATION AS TO BANK SHARES, AND THAT THE ASSESSORS SO DECIDED, IS NOT WELL FOUNDED.

1. If, in the original assessment, there was unlawful discrimination as to the assessments of bank shares, then the curative act would not relieve the vice. We insist, however, that there is no proof here whatever, that any such illegality existed in the original assessment.

The assessment was the same as is referred to in the Stanley case. No proof whatever, on this subject exists here. And no illegality being alleged or proven excepting as to the oath and the manner of assessing, as to the lists of stockholders, none other will be presumed by the court.

2. The laws of New York afforded a remedy for the direct review of the assessment, and this the plaintiff in error and his assignors should have availed themselves of.

3. The act is claimed to be only a curative act as to the irregularities under the State law, *i. e.*, the *oath*, and *the form of the list* of shareholders, in all other respects, both as to notice and otherwise, the original assessment was regular and valid.

We concede that if the *original assessment* was *void* because in violation of the Federal Statute as to discrimination against bank shareholders that this vice has not been cured by this act.

We stand upon the proposition that the original assessments, so far as the Federal Statute is concerned, were valid; and that the curative act remedies those things which were irregular under the State law.

There is nothing in the admission of facts or findings which justify the claim that the assessments themselves were in violation of the Federal Statute. And the act cured the *irregularity*, which was not *jurisdictional*.

VI.

THE PLAINTIFF IN ERROR, HAVING TAKEN STEPS UNDER THE ACT IN QUESTION, AND HAVING SECURED BENEFITS BY VIRTUE OF ITS PASSAGE, IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE ACT.

The assessors, pursuant to section 2 of the act in question, published a notice.

See Admission of Facts XVII., p. 32.

The plaintiff in error served on the assessors, pursuant to the notice so published, a written notice and demand, which is set forth at p 32, Transcript of Record. (Fol. 37.)

The assessors refused to cancel the assessments, or to reduce them, as demanded by plaintiff in error, but at the same time, offered to "*receive evidence touching the indebtedness of any of the stockholders*," as provided for in said act, and thereupon the plaintiff in error, as assignee of Lemon Thompson, Sylvester Hale, Maria Bender, and the estate of C. W. Bender, deceased, made proof, under section 3 of the act, that said persons and estate were indebted, at the time of their assessments, in an amount greater than the aggregate amount of their personal property, including bank stock, and thereupon the assessors made their certificate, pursuant to section 4 of said act, which certificate was sent to the Board of Supervisors and to the County Treasurer. The amount of money so required and certified by the assessors, pursuant to the proof made before them under the act was $2,071.66. *This amount was raised and paid to plaintiff in error.*

See Admissions of Fact V., p. 26.

We claim, that the plaintiff in error cannot take the benefits provided for him by the act, and at the same time, repudiate the act itself.

(*a.*) A mere perusal of the act (p. 37 of the Transcript of Record), shows that it is one whole piece; that no part of it can be separated from the remainder and held a valid and subsisting provision, while rejecting the other part.

The provision for repayment of the moneys therein mentioned is so intimately blended with the provision validating the assessments, that they are obviously inter-dependent, and it is equally obvious that the provision for repayment would never have been put in, if that which validated these assessments could not have life.

Where such is the case, the *whole* act is valid or void.

People v. Bull, 46 N. Y., 46 at 68.
Gordon v. Comes, 47 N. Y., 608–617.
Boese v. King, 78 N. Y., 471; affirmed, 108 U. S., 379.
In re Roberts, 81 N. Y., 63 at 67.
In re Middletown, 82 N. Y., 196, 202.
Allen v. Louisiana, 103 U. S., 80 at 83–84.
Railroad Co. v. Schutte, 103 U. S., 118 at 142.

(*b.*) The plaintiff cannot, therefore, claim that the law was constitutional so far as to provide for the payment of moneys to him, and at the same time that it is unconstitutional so far as its attempt to validate the assessments is concerned. They both stand together in that respect, and no right can be discovered for the retention of the moneys paid to and received by plaintiff, other than this act.

(*c.*) The plaintiff cannot set up his general alleged right to recover moneys from defendant for illegal seizure of property on assessments alleged to have been void, as the reason for his taking and retaining these moneys. These moneys were paid *by virtue of this act*, and this *plaintiff has obtained them by virtue of this act alone.*

(*d.*) It is a familiar rule, applicable even to constitutional provisions, that no one who accepts or receives a benefit from a provision in his favor, can at the same time repudiate its validity or legality.

A good exemplification of the doctrine is to be found in a case in Kentucky, where the question arose as to the right of some parties who had received and accepted certain benefits from an alleged unconstitutional act, to set up such alleged unconstitutionality.

The case was that of Ferguson v. Landram (5 Bush, 230), and the following were the facts:

To avoid the draft in Gallatin county, the people met at the county seat, resolved to raise $20,000 to be distributed as bounties, etc., and appointed a committee to borrow the money and to obtain an act of the Legislature to authorize the County Court to issue bonds, and to levy a tax to reimburse the advancers of the money. The money was borrowed, volunteers obtained, the draft prevented, the act of the Legislature procured, the bonds issued and the tax levied.

The court held the act unconstitutional, but also held that parties were estopped from deny its constitutionality by participating in the procurement of its passage or by becoming recipients of benefits under it.

So, accepting part of a claim, submitted to Board of Audit, is a bar to a recovery of the balance.

Bruck v. Company of Plymouth, Iowa, 30 Albany Law J., 179.

(*e.*) As is said per Ruger, Ch. J., in Mills v. Hoffman (92 N. Y., 181, at 189, 190), a party cannot enjoy the rights awarded to him by a judgment and deny its *force as an adjudication*.. "It appears "that the petitioner has now moneys in her hands which she has "received from the appellant solely by force of the judgment in "question, and claims to repudiate the obligations of the same "judgment under which he paid those moneys. This we think she "cannot do. The receipt by her of such moneys was an unequivo-"cal act of ratification, made with full knowledge of the circum-"stances, and at a time when she was capable of binding herself, "and she cannot now be permitted to deny the validity of an act "which she has thus ratified and confirmed."

(*f.*) Again, In re Application of Cooper, etc. (93 N. Y., 507, 512), the court said:

"It is very well settled that a party may waive a statutory and, "even a constitutional provision made for his benefit, and that having "once done so, he cannot afterward ask for its protection. (Lee v. "Tillotson, 24 Wend., 337; Embury v. Conner, 3 N. Y., 511; "Cooley's Const. Lim., 181.) The appellant is in this position. He "participated as an actor in procuring the order which he now seeks "to set aside, and took his chance for a satisfactory valuation of his "property for the purpose contemplated by the act. To that end "there was not only acquiescence on his part, but intelligent and "efficient dealing with the matter and consent to the order. By "this consent he must be deemed to have made his election and "should be held to it."

(*g.*) And, in re Application of Woolsey et al. (95 N. Y., 135, in Court of Appeals), it has just been held, that "where, upon appeal from an order in proceedings to take lands for a street, it appears that some of the appellants and others similarly situated, have received the awards made to them for their lands, it is error to set aside the proceeding. Acceptance of the award is a waiver of any

right to object to the constitutionality of the act under which the proceeding is taken, and an affirmance of the validity of the whole proceeding."

(*h.*) It is no answer to this position for the plaintiff to say he claimed, before the assessors, while proceeding under this very act, to recover all the moneys which had been taken. He made the claim while himself taking the very steps provided for in the act, appearing before the assessors and asking them to decide in his favor as to the amount, while they and he were acting under its very provisions. As to some portion of the claim, the assessors decided in his favor, and provided for the raising of a portion of his claim by virtue of this same act, and by virtue of these provisions alone this portion was raised by tax, received by the county treasurer, and paid to and received by him, all by reason of these very provisions in the act in question.

The same principle runs all through the law, that a person shall not be permitted to acquire, or receive a benefit from any act, or by any means, while at the same time repudiating such act or means.

Watson v. Watson, 128 Mass., 152.

(*i.*) It is no answer on the part of the plaintiff in error to this position of defendant to say, that he claimed to have the right to recover from defendant, irrespective of this act, a much larger sum than he received under it, and that in taking the amount that was raised for and paid to him by virtue of the act, he was only receiving some portion of what he claims was due him.

The difficulty with such answer is, that the claim of plaintiff *in its entirety* was seriously and earnestly disputed by defendants.

If not for this act, the plaintiff would not have received any portion of the claim made by him, at least for years to come. Its validity and propriety were strenuously denied by defendants, and could not have been recovered in any court without years of litigation and contest.

It was, therefore, a disputed claim, to say the least, and there was no judgment or other conclusive evidence which showed that,

as between the parties, the plaintiff was, beyond all peradventure or doubt, and beyond all room for contest, entitled to the full amount claimed by him.

Under these circumstances, an act is passed which provided a tribunal which did not otherwise exist and whose existence was wholly the creation of the act, and under which act the tribunal was organized, to hear what the plaintiff might allege in the way of proof to entitle him to the benefit of its provisions, and to a payment of whatever sum such tribunal might decide to be due him.

Here, therefore, was a distinct benefit proffered to the plaintiff, which he might accept or reject. No law compelled him to go near the tribunal, or to submit any of his claims to its decision. Yet, with full knowledge of the provisions of the act, the plaintiff deliberately sets his claims before the tribunal created by such act, and demands full payment of all his claims. This demand is refused. Even then the plaintiff might have refused to proceed any farther. But, instead of that, he goes on under the provisions of the act, makes further proof, submits his claim to the decision of the tribunal, and takes the moneys which were awarded him by it, and raised by tax from the taxpayers, and paid to him by the county treasurer. But for this act he would not have received this money in the way and at the time he did. It cannot be averred that he would ever have received it. But whether he might or not, at the end of a long litigation, by reason of this act, he has received now what otherwise he would not have received.

(*i.*) This is not the case of a mere waiver as to which a person gives notice when doing, or consenting to the doing, of some act that it shall not be construed as a waiver on his part of any right which he might otherwise have; but the act here done by plaintiff in making his claim and taking the money is an entire act; and it is the act itself which is indivisible, and by which he takes the advantage of and the benefits under the position and provisions of the legislative enactment, which conclusively estops him from questioning it. It is not rendered the less so because while doing this act he makes a statement that he means it shall not have the effect which the law says it must and does have.

In other words, he has accepted all the benefits provided by the act, and now claims that the act, so far as it validates assessments, is void, and he makes this claim while he has the money in his pocket which he has received by virtue of this very act

Can there be a plainer case for the application of the principle contended for, that a man shall not, by some positive action on his part, accept and receive the benefits of an act and at the same time repudiate its validity?

VII.

THE SECOND ASSIGNMENT OF ERRORS (fol. 62, p 46), EXCEPTION V, IS NOT WELL TAKEN.

It is, that the assessment was in violation of section 5,219, United States Revised Statutes, which is, as follows:

"SECTION 5,219. Nothing herein shall prevent all the shares in any association, from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State, within which the association is located, but the Legislature of each State may determine and direct the manner and place, of taxing all the shares of national banking associations, located within the State, subject, only, to the two restrictions, that the taxation shall not be at a greater rate, than is assessed upon other moneyed capital, in the hands of individual citizens of such State, and that the shares of any national banking association, owned by non-residents of any State, shall be taxed in the city or town, where the bank is located, and not elsewhere."

The assesssments were included in the valuation of the personal property of the assignors

On pages 27, 28, 29, 30 of the Transcript of Record, "Facts Admitted V.," it is shown what the facts were.

(*a.*) The list of shareholders, with residences and number of shares, was sent to the assessors *by the plaintiff in error* (see p. 30, Transcript of Record). This list was taken by the assessors, who added to it, opposite each name, the figures to be deducted, because of the real estate assessment, and when so treated by the assessors, it contained every requisite element of, and was, an assessment.

It had the names of each shareholder, the number of shares each held, the proportional amount to be deducted from the par value of

each share for the real estate assessed to the bank itself, and the amount of the assessment on each shareholder after the deduction of the proportional amount for real estate. This list was made out on request, and it was thus done because the bank officers knew the rule of assessment theretofore adopted by the board of assessors, and assumed there would not be any change. This list, thus received and treated by the board, contained everything that could have been put in by the board. The board, therefore, did assume and decide that this list, which, as matter of fact, contained an actual assessment, was the assessment made by the board on these shareholders for their shares, and was regarded by the board and meant by the board as a legal and valid assessment, the same as if it had been physically included in the roll before September first, and no alteration was made after September first. (Facts V, VI, p. 30 Tr. Record.) Here was an actual decision, a judicial determination as to amount and as to each person. There was nothing more than mere form in putting these very names down again on a particular book, and carrying out certain figures in certain columns. Regarding the assessment as made, just the same as if these very names and figures had been copied into the book, the asssessors, in accordance with the statute, stated they had completed their assessments, and gave notice for the purpose of corrections.

During the time for correction, this list was present, as a part of the roll, open for inspection and examination, and for the review and correction of assessments (Facts, p. 30 Tr. Record; deposition of Weaver, p. 36, fol. 40). *It was accessible to persons, the same as the actual roll itself* (Facts VI, p. 30) Then, after the corrections had been made, the whole of the preliminary assessment, including the list and assessment of bank shares, were, as corrected, copied into the assessment-book and sworn to by the assessors, and formed the assessment-roll. This was a substantial compliance with the statute. Everything going to protect the taxpayer, everything tending to give him notice of the amount and character of his assessment and the grounds thereof, had been done by the assessors. They had decided as to person, amount of tax, and ground thereof. This decision was in writing, open for the inspection of, and inspected by the shareholders. As to what provisons of the statute are merely directory, Chief Justice

Shaw said: "One rule is very plain and well settled, that all those "measures which are intended for the security of the citizen, for "ensuring an equality of taxation, and to enable every one to know "with reasonable certainty for what polls and for what real and "personal estate he is taxed, and for what all those who are liable "with him are taxed, are conditions precedent, and if they are not "observed, he is not legally taxed, and he may resist it in any of "the modes authorized by law for contesting the validity of the "tax. But many regulations are made by statute designed for "information of assessors and officers, and intended to promote "method, system and uniformity in the modes of proceeding, the "compliance or non-compliance with which does in no respect affect "the rights of taxpaying citizens. These may be considered direc- "tory. Officers may be liable to legal animadversion, perhaps to "punishment for not observing them, but yet their observance is "not a condition precedent to the validity of the tax."

Torrey v. Millbury, 21 Pick., 64-67.

In above case the court held the statute, that the assessors in making out the list containing the valuation and assessment of polls and estates should have separate columns so as to exhibit "the true value of real estate" and "the reduced value of real estate," and the same as to personal property, was directory only, so long as the assessment-roll contained a column of the "value," and hence the assessment was not void.

So, in a recent and well considered case in the Supreme Court of New York, where a railroad company sought to escape taxation, because of an alleged irregularity in the oath taken by the assessors, when the assessors *afterwards* took the correct oath, Judge Daniels says (39 Hun, 335, concurred in by Davis, P. J., at p. 336):

"Upon this subject, the statutes directing the performance of "official duty, even where a time for that purpose may have been "stated are not in all cases to be literally carried into effect. For "where the act contains no negative provision, and time does not "appear to have been deemed essential, and the duty relates to the "interests of the public, it may be performed even after the time in "which the law may have directed that it shall be done. In other "words, the time mentioned in the statute will in all these cases be con- "sidered to be not mandatory, *but directory.* (Parish v. Golden, 35

"N. Y., 462). And this rule has been applied to the assessment of "taxes. In Rawson v. Van Riper (1 T. & C., 370), the statute "required the school trustee to make the assessment for a tax voted "for within thirty days after the votes had been taken."

"The trustee failed to comply with this direction, but the assess- "ment was afterwards made and it was sustained by the court, upon "the construction that the statute, as to time, was to be held *to be* "*directory*."

"A point of the like description arose in Witheril v. Mosher (9 "Hun., 412), and the same conclusion was adopted and acted upon "by the Court."

Rome, Watertown & Ogdensburg R. R. Co. v. Smith, 39 Hun, 332, at p. 335.
Bradley v. Ward, 58 N. Y., 401.
In re McMahon v. Palmer, 102 N. Y., 176.

(*b.*) It must be borne in mind all the time, that this assessment is not final; it is only a proposed, preliminary, assessment up to September first, but one which cannot be, in any event, increased. When thus proposed, and notice given, it is all open for correction, and, as matter of fact, innumerable corrections are made in every assessment during this time. The face of the book is scarred all over with alterations and corrections. The assessment is not, as matter of fact or law, really completed until the time for corrections has expired. Then the whole is copied into a book, sworn to, and thus completed forming the assessment-roll. "The mere roll, "divided into columns, and containing a certain account of real or "personal property opposite the name of an individual, is not a "final adjudication, but preliminary thereto. Notice must be "given; the taxpayers have a right to be heard, and introduce evi- "dence. When this has been done, and all objections disposed of, "the assessors, or a majority of them, shall sign the roll, and attach "the certificate in the form prescribed by the twenty-sixth section. "*The record is then, and not till then, complete.*"

Per Gardiner, J., in Van Rensselaer v. Witbeck, 7 N. Y., 517, at 521.

(*c.*) The principle to be deduced from these cases is, that the assessors must make some decision as to an assessment, in the way of a proposed assessment, subject to correction by reduction, on or before the first of September, and that such determination ought

to be put in writing. Then it is open for inspection and correction. After which time, and the corrections have been made, the final assessments thus completed, may be put in a *final book* and sworn to by the assessors, at which time it becomes the completed assessment. It is undisputed that, at this time, the names of all the shareholders, and the amounts as at first decided, as amended only by the corrections made, were included in the assessment book as sworn to, and as passed over to the supervisors, who affixed their warrant and seals thereto.

(*d*) Now, whether prior to September first, there should be one list for all personal property, or one for bank stock and one for other personal property, is a question of form or procedure and of State law.

The court below held the assessment defective in that respect, but that the defect was cured by the validating act.

The United States statute, section 5,219, deals with no such question or questions.

It provides that the shares may be included in the valuation of the personal property of the owner.

They were so included. That valuation was made as a *quasi*-judicial act on the first of September, and not before.

How that valuation should be arrived at is, by § 5,219, in terms, left to the State to decide, subject only to the two exceptions stated.

(*e*.) The irregularity here claimed, was, at most, a non-compliance with a statute, directory in its nature, a mere matter of procedure, and would not invalidate the assessment.

The provision of law which required the assessment to be made on or before September first, was directory only.

Williams v. School District, 21 Pick., 75–82.
Bradley v. Ward, 58 N. Y., 401.
In Re McMahon v. Palmer, 102 N. Y.

B. The oath of the assessors as to *personal* property was regular.

It was, "and also that the said assessment-roll contains a true "statement of the aggregate amount of the taxable personal estate

"of each and every person named in such roll, over and excluding "such stocks as are otherwise taxable, and such other property as "is exempt by law from taxation, at the full and true rates thereof, "according to our best judgment and belief."

Transcript of Record, p. 31.

C. So far as the assessment is claimed to be invalid, under section 5,219 U. S. R. S., because of the allegation that the shares were assessed at a higher rate, etc., is concerned, we refer the court to our brief in the Stanley case, and add:

It appears, affirmatively in this case, that there was no demand for a reduction, as to any of these assessments.

p. 35 Tr. Record, fol. 39.

D. As to the point made, that the assessments made upon, and to the "estate" of, deceased persons, we say:—

1. An assessment upon the "estate of R. H. M.," together with a description, by metes and bounds of the land, was held, not to be so defective as to be invalidated, though "R. H. M." was dead, and the land owned by his heirs.

Moale v. Mayor, etc., Maryland Ct. Appeals, 18 Cent. L. J., 459.

2. That, assuming such assessment to be irregular, it is curable. The Court of Appeals has decided, in commenting on the case of Trowbrige v. Horan, (78 N. Y., 439), which plaintiff in error relied upon—that such a defect was curable, and was cured, under a statute which provided that no assessment should be void, in consequence of the rightful owner or owner's name not being inserted in the roll; although the statute required that the name of the owner should be stated, if known.

Haight v. Mayor, 32 Hun 153, affirmed June, 1885, in Court of Appeals, 99 N. Y., 280.

3. The object of the assessment in the name of the owner is, among other things, to give notice to the owner—also if a sale takes place, to identify the premises.

Neither of these reasons exist as to assessment of personal property, and bank shares are often held by the "estate" of deceased persons. Indeed, the plaintiff in error, assumes to be the assignee of several of these "estates" as the rights in action of some of the shares assessed to "estates."

VIII.

The plaintiff in error has entirely lost sight of the principles upon which he commenced this bank litigation. He was to obtain a decision upon great questions.

While those questions were raised and discussed and decided against him on all points but one, *i. e.*, the right to deduct debts, he and his assignors were paying taxes annually under a mere formal and technical levy, and now, by reason of having had the good fortune to have this formal levy made, he is now endeavoring to recover from defendants thousands of dollars, which are simply the shares of himself and assignors, of taxes paid for the benefits they have received, and the right to recover them back is now sought to be enforced by the application of the narrowest and most absolutely technical rules, from a violation of which the plaintiff has suffered no more than hundreds of other citizens, but they, unlike him, have not paid under protest, for the purpose of protecting a right which he now seeks to vindicate upon wholly different grounds than such as moved his former action. Such action should be viewed with no leniency, and the plaintiff should have administered against him the strictest rule of law.

In such view the claim that plaintiff, in endeavoring to himself enforce the penalty, has unwittingly perhaps, but nevertheless, effectually, waived his right to thus enforce it, may be looked upon without any great sorrow on the part of any one other than the plaintiff and his assignors.

Of course, in this argument we do not concede in any way the validity of the plaintiff's assumed distinction between a "coercion by law" and a "coercion in fact." A payment under coercion by law is as much an involuntary payment as is a coercion in fact. It is by no means conceded that the original assessment is void, and hence the argument that by the validating act in question, we

simply give a portion of what we concede to be due, can have no weight

In any possible aspect of the case plaintiff, by reason of accepting the benefits of the act, has received a large sum of money, which otherwise he would not have received for many years, and hence he cannot take such benefits and repudiate the rest of the act.

IX.

THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE AFFIRMED, WITH COSTS.

WHEELER H. PECKHAM,
NEW YORK.

S. W. ROSENDALE,
ALBANY, N. Y.,
Counsel for Defendant in Error.

March, 1887.

122-154

UNITED STATES SUPREME COURT.

CHAUNCEY P. WILLIAMS,

Plaintiff in Error,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,

Defendant in Error.

Supplemental Brief for Defendant in Error.

WHEELER H. PECKHAM,

S. W. ROSENDALE,

Of Counsel for Defendant in Error.

BURGOYNE'S "Quick" Print, COR. WALKER AND CENTRE STS., N. Y.

UNITED STATES SUPREME COURT.

CHAUNCEY P. WILLIAMS,
Plaintiff in Error,

AGAINST

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY,
Defendant in Error.

Supplemental Brief for Defendant in Error.

The Court below did not err in holding the act of 1883 effective.

The act in terms refers to assessments which have been collected.

Its whole machinery is provided and adapted to cases where the assessment has been collected and provision is made for ascertaining and refunding the excess.

Record, pp. 37–38.

It is constitutional.

The cases cited by plaintiff in error are all cases of contest between individuals in respect to property, the title to which is claimed to have been affected by the sale complained of.

It was in several cases held that such title as between the individuals could not be affected by subsequent legislation.

The case at bar is different. Here there is no title to any property in dispute.

The defendant in error *collected* a tax. Because of the irregularity in not complying with certain provisions of the law—not jurisdictional in respect to the validity of the law—the Legislature by act cures the irregularity, gives the taxpayer an opportunity for hearing before the assessors and provides for a return of such portion of the amount collected as may be in excess of the tax as ultimately ascertained.

What loss or injury can plaintiff in error suffer?

Should it be conceded that the *collection* cannot be made valid, then we have the *assessment* at least made valid, and the fund to pay it belonging to the plaintiff in error in the hands of the State or county applied to its payment and the balance given to the plaintiff in error.

If, now, plaintiff in error could recover by action the whole tax collected they would immediately be liable to have the assessment enforced against them.

The result would be the same.

Now, it must be remembered that this is not an action of trespass or ejectment.

It is as plaintiff in error in the Stanley case, on page 24 of his brief, says, "a *quasi* equitable suit" "being for money had and received."

Being such, can any good reason be suggested why he should recover more than under the circumstances, *ex æquo et bono*, he ought to recover after deduction of the tax thus properly assessed?

What vested right is thereby disturbed?

As to the sixth point of plaintiff in error, it is not raised in the record.

There is neither exception nor assignment of error making any reference to such questions.

In respect to the argument of plaintiff in error as to

waiver by acting under and receiving benefits from the act, it must be remembered that the act extended to plaintiff the right to obtain restitution of the excess, provided he acted under the act and made proof as to what was the excess. It was consequently offered and accepted as the excess, not as part of a greater liability.

It gave him a privilege which, but for the act, he would not have had.

Assume that he had a right of action for the whole, with its chances and uncertainties.

This act gave him a new and definite privilege.

After accepting such privilege he cannot claim its unconstitutionality.

The judgment should be affirmed.

WHEELER H. PECKHAM.
S. W. ROSENDALE,
Of Counsel for Defendant in Error.